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REPORTS

OF

IMPORTANT CASES

Heard and Determined

BY THE

SUPREME COURT OF CEYLON,

DURING THE YEARS

1843-'55.

BY

THE HON. P. RAMA-NATHAN, M.L.C.,

ADVOCATE.

COLOMBO.

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Administration.

1.—*Administration—Preferent right of widow—Moorish widow.*

A widow has a preferent right to letters of administration to her husband's estate, but as a Moorish woman would not appear or act in public except through an agent, it is desirable to grant administration jointly to her and another person.

D. C., Manaar, 5,073. *In re Wapoe Marcair* ... 60

2.—*Administration—Parentage of applicant—Separate suit.*

Where the only child of intestate by his first marriage applied for letters of administration to his estate in default of the widow's taking them out, and letters where granted to the widow, who denied the legitimacy of the first applicant:

Held, that the applicant could not establish her legitimacy in the administration proceedings but must bring a separate suit for the purpose.

D. C., Badulla, 58. *Rangee* v. *Bahe* 139

3.—*Administration—Joint grant of letters.*

Administration can only be given to one estate under one grant of letters of administration, since it would lead to confusion to mix up together estates in which different people are interested in different degrees.

D. C., Jaffna, 7,855. *In re Deegopulle & wife Annama.* 63

4.—*Administration of Regimental Officer's estate—Act* 6 *Geo.* iv. c. 61—*R. & O.* 1833, sect, iv. r. 7.

The district court appointed an administrator to the estate of W., paymaster of the Ceylon Rifle Regiment, after citation upon which neither widow nor next of kin had appeared.

Held, that under the provisions of the Act 6 Geo. iv. c. 61 no such administrator appointed by the court was necessary, the major of the regiment (under Article 30, sect. 1 of the Articles of War) being authorised to collect the assets of a deceased officer; and that the present appointment must be set aside, although the administrator appointed had come forward out of friendliness for deceased, and had incurred expenses in the office, while the regimental nominees had done nothing to secure the assets or to make an inventory.

D. C., Colombo, 1,046. *In re Warren, O'Halloran* v. *Reyne* and others 43

5.—*Administrator—Power to alienate and encumber intestate's property.*

By the settled practice here (see Chilaw No. 4,416, *Morg. Dig.* p. 252) an administrator is at liberty to alienate, and consequently

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to encumber, the whole estate entrusted to him, the remedy for the heirs being against the administrator and his heirs for malversation.
D. C., Kandy, 19,124. *Murugappa* v. *Christina* ... 65

6.—*Administration by Secretary of Court.*
The Secretary is not authorized to file such an application for administration as is required when next of kin apply, but only an affidavit of death, under the 7th clause of the Rules of Court, sect. 4. The intervention of a proctor is not necessary.
D. C., Colombo, 1,056. *In re George Adrian Perera,* deceased 56

7.—*Interlocutory or final order—Grant of letters of administration—Costs, further consideration of—Practice.*
A decree granting to a party letters of administration is a final order, and not interlocutory.
When a court wishes to reserve to itself the further consideration of costs, it should expressly reserve such power in its decree.
D. C., Badulla, 121. *Re Mootoo Banda* 120
See EXECUTOR, 2, 5.

Administrator.
See DISTRICT COURT, 2.
INJUNCTION, 2.

Admission.
See EX PARTE HEARING.
JUDGMENT, 4.
PRESCRIPTION, 4.

Adverse possession.
See POSSESSION, 1.
PRESCRIPTION, 1.

Advocate.
Advocates and proctors, duties of—Bill of costs—R. and O., 25th November, 1835, cl. 1.
Observations on the respective duties of advocates and proctors, and on the costs taxable by them.
D. C., Kandy, 18,818. *Ponna* v. *Kirri Ukkoova* ... 111

Agreement.
Agreement to convey house—Vendee in possession—Ejectment—Notice to quit.
Defendant, the owner of certain premises, agreed to convey them to plaintiff, who thereupon got into possession. No transfer was

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made, and defendant gave plaintiff notice to quit, in default of which defendant threatened to remove plaintiff's things from the house. Two days later the defendant entered the house by force and removed the things, for which plaintiff brought the present action in trespass.

Held, (reversing the decision of the court below), that both by the English and the Roman Dutch law the defendant was entitled to resume possession of the premises and to remove the furniture of the plaintiff therefrom after notice given to quit; and that plaintiff's action must be dismissed.

D. C., Jaffna, 4,591. *Toussaint* v. *Sattorokelsinga* ... 174

See SPECIFIC PERFORMANCE.

Amendment,

See INDICTMENT, 2.
NONJOINDER.

Animal.

Animal, vicious—Liability of owner for damage done by—Scienter.

Where the owner of a vicious animal has notice of its having done an injury, or being accustomed to do mischief, he is bound to secure it at all events, and is liable in damages to a party subsequently injured, if the mode of securing it adopted proves to be insufficient.

C. R., Calpentyn, 2,066. *Manuel* v. *Naina* ... 65

Appeal.

1.—*Appeal—Interlocutory order—Stay of proceedings pending appeal from interlocutory order—Postponement—Absence of material witnesses.*

It is only where the justice of the case requires the immediate settlement of the points raised in an interlocutory order, that the proceedings should be stayed pending appeal therefrom.

Where it is necessary for plaintiff to prove express malice in an action for defamation, and three of his witnesses on this point are shown by affidavit to be absent on process served, the court should allow him a postponement, notwithstanding that he is in a position to prove *aliunde* the publication of the defamatory matter.

D. C., Galle, 10,965. *Jayewardene* v. *Cripps* ... 128

2.—*Appeal out of time—Laches—Mortgage—Covenant to redeem within fixed period.*

Where it was sought to appeal against an error of law in a judgment pronounced six and a half years before, against which an appeal

had previously been lodged and withdrawn, and there was no fraud or other good ground alleged, the Supreme Court rejected the appeal. Though in general agreements for the redemption of mortgaged property within a time certain are invalid, yet such agreements are in some exceptional cases upheld.

D. C., Colombo, 31,585. 136

See PRINCIPAL AND SURETY, 1.
PROCTOR, 5.
PROVISIONAL JUDGMENT, 6.
PETITION OF APPEAL, 1, 2.

Appeal to the Queen.

See EVIDENCE, 6.

Appearance.

See PRACTICE, 2.

Arbitration.

Arbitration—Award—Death of party before award.

The death of one of the parties to a reference, before award, revokes the submission *in toto*, if there is no provision to the contrary in the instrument of submission.

D. C., Jaffna, 1,019, *Thilippo* v. *Domingo.* ... 77

Arrack.

1.—*Arrack, unlawful seizure of—Ordinance No.* 10 *of* 1844, *sects.* 34, 59 *and* 61.

The 61st section of Ordinance No. 10 of 1844 makes penal the abuse of power and authority by persons having such; and persons are therefore not punishable under this provision, that have acted vexatiously and without possessing any right whatever.

P. C., Galle, 4,740. *Janchy* v. *Silva* 101

2.—*Arrack Ordinance No.* 10 *of* 1844, *sect.* 40—*Effect of license on day of issue—Divisibility of day.*

Defendant drew toddy on a certain day, and subsequently on the same day obtained a license in the form H. required by section 40 of Ordinance No. 10 of 1844.

Held, that he had been rightly convicted of unlawfully drawing toddy in breach of that section.

P. C., Kalutara, 7,996. *Cokay* v. *Fernando* ... 125

3.—*Arrack—Ordinance No.* 10 *of* 1844, *sects.* 32, 37—*Vehicle of third party, confiscation of.*

Defendants were charged with possessing 16 gallons of arrack without a license, and were convicted and fined and the arrack, and

also the boat in which it was (which belonged to a party not defendant) declared forfeited.

Held, that though possibly the boat may have been intended for the illicit removal of the arrack, such intention alone would not render it liable to confiscation without evidence of the removal therein; and the Queen's Advocate not supporting the forfeiture, it was set-aside.

P. C. Matura, 1,718. *Don Thomis* v. *Hengo* ... 90

Arrest in mesne process.

1.—*Arrest in mesne process—Meditatio fugæ—Evidence by affidavit—Security for contingent and untaxed costs.*

Where the affidavit, on which warrant of arrest was prayed for, merely stated that deponent "doth verily believe, and hath good grounds for believing, that the plaintiff intends to leave the jurisdiction of the court," without setting out facts indicative of such intention,

Held, that the affidavit was insufficient;

Held also, that a plaintiff could not be arrested, at instance of defendant, in order to compel him to give security for contingent and untaxed costs.

D. C., Galle, 10,883. *Huskison* v. *Whiteside* ... 14

2.—*Arrest in mesne process—Meditatio fugæ.*

To authorise a warrant of arrest against a defendant as *in meditatione fugæ*, there must be a debt due, or some enormous personal wrong done, to the plaintiff by the defendant; and in the case of debt the plaintiff must aver that he verily believes, and also show by the oath or affidavit of a third person that he has good reason for believing, that the defendant intends to abscond or to leave the jurisdiction of the court.

The requisites for such warrant further discussed.

D. C., Kandy, 25,440. *Halyburton* v. *Broughton* ... 119

Arrest.

See MURDER.

Arrest of judgment.

Arrest of judgment—Description in indictment as "bullock"—Proof of property.

Where, on indictment for stealing a "bullock," it was proved that the animal stolen was a *bull*,

Held, this was no sufficient ground for arrest of judgment. But the fact that the animal was not proved to belong to the person laid as owner, nor to be in his possession, is a good ground for arrest of judgment.

D. C., Colombo, 11,202. *Kuda Appu* v. *Baba Appu* ... 8

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Assault.

Assault—Trespass to land—Claim of right.

Where upon a charge of assault defendant pleaded not guilty, and both parties claimed the land on which the assault took place; and the police court referred the parties to a civil action in the first instance;

Held, that the order was wrong. The police court should have heard the complainant's evidence; after which the defendant would have been entitled to comment on the effect of that evidence and also to show that the assault was committed under an asserted authority, or pursuant to a claim of right of property; because where title to property comes in question, the summary jurisdiction of justices of the peace is ousted, where the claim of title appears to be made *bonâ fide*.

P. C., Matela, 250. *Kaloo Banda* v. *Goloo Banda* ... 84

Assault and robbery.

See INDICTMENT, 3.

Assessors.

See DISTRICT COURT, 2.

Batticaloa.

See SUCCESSION.
THESAVALAMAI, 1.

Beena marriage.

See KANDYAN LAW, 2, 3, 4.
MAINTENANCE.

Bond.

Bond—Consideration—Specialty or simple contract—Exceptio non numeratæ pecuniæ.

Bonds in Ceylon stand on the same footing as simple contracts in England, and want or failure of consideration thereon may be proved by other evidence. Though the instrument cannot be contradicted by parol evidence, such evidence may be adduced to show under what circumstances the instrument was entered into. Further, by the Roman Dutch law, a plaintiff suing within two years of the date of a bond must prove the passing of consideration if it be denied, unless the defendant have renounced the *beneficium non numeratæ pecuniæ.*

D. C., Galle, 14,502. *Don Cornalis* v. *Manuel Perera*... 161

See EXECUTOR, 4.
MORTGAGE, 2.

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Book debt.

See COSTS, 4.

Boundaries.

Boundaries, disputed—Survey.

It is very desirable that where boundaries are in question parties should agree to a survey being made in presence of all the witnesses, but a court cannot compel an unwilling party to join in having such survey made.

D. C., Galle, 15,977. *Meera Lebbe* v. *Sinne Lebbe* ... 51

Buddhist ecclesiastical law.

1.—*Buddhist ecclesiastical law—Amerapoora and Siamese sects—Ejectment.*

Plaintiff, a priest of the Molkerigalle branch of the Siamese sect of Buddhist priests, was entitled to the incumbency of a temple, to which, with plaintiff's consent, defendant, a priest of the Wihelle branch of the same sect, had been conducted, and which he had possessed and improved for many years.

Held, that plaintiff was not entitled to recover in ejectment.

D. C., Tangalle, 1,154. *Somangalle Terunanse* v. *Sonnothe Terunanse* 158

2.—*Buddhist priests—Amerapoora and Siamese sects—Gift as Sangike.*

J. made a gift of a garden, for the purpose of its being enjoyed (under the superiority of R. T., a priest of the Siamese sect) as *sangike* property by all priests resorting there. R. T. built a temple on the land in which he officiated till his death. He left two pupils, plaintiff and defendant, and the action was to restrain defendant (who had after ordination under R. T. gone over to the Amerapoora sect) from officiating in the temple.

Held, reversing the decree of the district court, that the gift was for the sole benefit of the Siamese sect, and that it would be *contra formam doni* to permit a priest of the Amerapoora sect to hold the property.

D. C., Galle, 15,092. *Dammadase* v. *Sobita* ... 42

3.—*Buddhist priest—Inheritance from father.*

Although a priest, if he has lay brothers and sisters, can have no claim to his father's land by inheritance, yet if he be the only child he inherits in preference to collaterals. The rule that a priest taking the robe renounces all wealth is not universal, as he may take by gift, bequest or purchase, and inherits from brothers and sisters.

D. C., Ratnapoora, 6,436. *Kande* v. *Kiry Naide* & another 51

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Carrier.

Carrier—Conveying goods for hire "as a public business"—Necessity for license—Ordinance No. 3 *of* 1848, *sect.* 6, [*No.* 14 *of* 1865, *sec.* 16.]

Section 6 of Ordinance No. 3 of 1848 made punishable any person who without a license used his carriage for the conveyance of goods for hire *as a public business.* To hire one's carriage for a single job constitutes no breach of the Ordinance.

P. C., Colombo, 11,096. *Gibson* v. *Silva*... ... 105

Champerty.

Champerty—Bonâ fide loan—Illegal contract.

Where plaintiff had lent defendant money for a law suit agreeing that they should divide the subject of suit if successful, and plaintiff appealed against a conditional judgment in his favor in a suit to recover the loan,

Held, that as neither party pleaded the illegality of the consideration, and plaintiff appeared to have lent the money *bonâ fide,* the Supreme Court would not set the transaction aside.

D. C., Ratnapoora, 4,939. *Wattoohamy* v. *Dingyhamy*... 32

Commission to examine.

See EVIDENCE, 2, 3.
EXAMINATION OF PARTIES, 1.

Compounding offence.

Compounding offence.

After the offenders have been prosecuted and convicted, no charge of compounding the offence can be supported.

D. C., Kurnagalle, 121. *The Queen* v. *Kauralle* ... 120

Consideration.

Consideration on deed of sale—Evidence—Contradicting written contract.

Where a deed of sale expressed clearly the receipt of consideration,

Held, that plaintiff could not show non-payment of consideration in contradiction of the deed.

C. R., Negombo, 164. *Lieme* v. *Lieme* 20

See BOND.
PROVISIONAL JUDGMENT, 5.
STAMP, 4.

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Contempt of Court.

1.—*Contempt of Court—Plaintiff giving process server false information as to defendant's whereabouts.*

Plaintiff, when requested by the process server to point out his defendant, said he had gone to the coast, knowing that this was false. The district court found plaintiff guilty of a contempt.

Held, that the plaintiff having been under no legal obligation to point out the defendant, could not be punished as for a contempt because he had given false information as to the defendant's whereabouts, it also not appearing that service of the process was prevented by such false information.

D. C., Colombo, 59. *The Queen* v. *Sidemberem* ... 107

2.—*Contempt of Court—Injunction—Writ of sequestration—Intermeddling with property sequestered.*

Where the district court issued a writ of sequestration directing the fiscal to sequester certain property and to notice parties in possession of such property to reserve and retain the same; and appellant, who was in possession of a house included in the writ, put a door and window to it and lived therein, and was punished for this act as for a contempt of court:

Held, that no contempt had been proved and that the conviction must be set aside.

D. C., Caltura, 10,028. *Re D. P. G. Sineweratne* ... 115

3.—*Contempt of Court—Writ of possession—Subsequent disturbance by defendant—Practice—Ordinance* 12 *of* 1843 [*No.* 12 *of* 1852, *No.* 11 *of* 1868 *etc.*]

Where plaintiff obtained a decree for land and was put in quiet possession by the fiscal in April 1845, and in July 1846 a criminal complaint as for a contempt was filed by plaintiff charging that "the defendant has been and is hitherto" withholding and retaining possession of part of the land,

Held, that this was not properly a ground for the summary proceedings of contempt.

The district court may proceed without the interference of the Queen's Advocate in all cases of contempt committed before it or against the execution of its process, the Ordinance No. 12 of 1843 being inapplicable to such cases.

When a party has once been put into quiet possession under a decree by the fiscal, and defendant commits a subsequent trespass, the general practice is to institute a new action, in which the only issues will be the putting into possession under the decree, and the defendant's subsequent trespass, on proof of which issues in plaintiff's favor the court would award exemplary damages against the defendant.

D. C., Galle, 8,827. *Queen* v. *Abraham* 79

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4.—*Contempt of Court, warrant of arrest for—Specification of offence—R. & O.* 1833, sect. ii. (*Forms.*)

Where a person was detained by the fiscal by virtue of a warrant under the hand of a district judge, directing the fiscal to take into his custody the said person "charged with contempt of court:"

Held, that such detention was unlawful. As a general rule, in all cases of imprisonment on warrant, the cause of commitment must appear on the face of the warrant. In a charge of contempt of court there should be a specification of the fact or facts constituting the species of contempt intended, in order that the offence may appear to the judges on a *habeas corpus.* The form of warrant of arrest for contempt, given in the R. & O., sect. 2, *Forms,* is in accordance with this view.

In re Gabriel Perera 86

See STAMP, 3.

Contract.

1.—*Contract, illegal—Purchasing of offices—Maxim, Ex turpi causâ non oritur actio.*

Where plaintiff sued to recover from defendant a sum of money paid for the procurement to the plaintiff of a place under Government, defendant having failed to procure such place:

Held, that the contract being illegal, and plaintiff *in pari delicto* with the defendant, he could not recover.

D. C., Batticaloa, 11,283. *Sedoepady* v. *Nicholas* ... 113

See BOND.
CHAMPERTY.
JUDGMENT, 6.
STAMP, 4.

Contribution, action for.

See COSTS, 2.

Costs.

1.—*Costs, liability for—Minor suing by next friend.*

Where a minor sues by his next friend he is not liable in costs, but the next friend is. The minor is liable if after attaining majority he have taken the conduct of the suit upon himself.

D. C., Jaffna, $\frac{100}{3,761}$. *Caderasen* v. *Caderen* and another. 56

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2.—*Costs, liability for, in solidum—Action for contribution—Prescription—Ordinance No.* 8 *of* 1834, *sects.* 5, 6.

Where plaintiff and defendant were condemned in costs, and plaintiff paid the whole costs and three years after sued defendant to recover half of the amount so paid,

Held, that the court was bound by the decision reported in Morgan's Digest, par. 545, to the effect that parties condemned generally in costs are liable *singuli in solidum*, and that therefore payment of the whole by plaintiff was compulsory.

Held also, that plaintiff's claim was not prescribed as an action on an unwritten promise, under sect. 5 of Ordinance No. 8 of 1834.

D. C., Galle, 8,262. *Weireman* v. *Jayesondra* ... 17

3.—*Triple costs—District Court.*

The Supreme Court finds no warrant in the Dutch law for district courts awarding triple costs.

D. C., Colombo, 8,931. *Silva* v. *Juan* 4

4.—*Costs, prescription against right to levy for—Book debt or account—Maxim, Certum est quod certum reddi potest.*

Where plaintiff was condemned in costs in August 1840, and defendant in November 1843 moved to issue writ to recover them, plaintiff contended that the right was prescribed in the three years as a "book account."

Held, that costs formed part of the sentence, and formed therefore no book debt between plaintiff and defendant but a judgment debt, which had not been prescribed.

Held also, that the delay in taxation did not affect this question, as costs were given by the judgment, and *certum est quod certum reddi potest.*

D. C., Chilaw and Putlam, 6,666. *Jayewardene* v. *Seniweratne* 17

5.—*Costs, exorbitant—Supreme Court reviewing taxation of district court.*

On complaints of exorbitant charges in bills of costs, the Supreme Court always exercises great vigilance, as the charge affects the conduct of the proctors, who are not in the habit of objecting to each other's high charges, of which the parties know nothing until execution issues.

D. C., Galle, 11,008. *Seneweratne* v. *Louis* ... 113

See ADMINISTRATION, 7.
ADVOCATE.
ARREST IN MESNE PROCESS. 1.
EVIDENCE, 3.
EXAGGERATION OF CLAIM.
JUDGMENT, 5.
STAY OF PROCEEDINGS.

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Court of Requests.

Court of Requests, jurisdiction of—Abatement of cause of damage—Ordinance No. 10 *of* 1843, *sect.* 5 [*No.* 11 *of* 1868, *sect.* 81.]

In an action to recover damages done to plaintiff's premises by defendant's trees, a court of requests has no power (under the Ordinance No. 10 of 1843) to require the trees in question to be cut down.

C. R., Matura, 2,849. *Altendorff* v. *Janse* ... 147

See NONSUIT.
PRACTICE, 1.
RENT.

Crown, liability of the.

See INSOLVENCY, 1.
PARTITION, 3.

Crown land.

1.—*Crown land—Summary proceedings to recover—Ordinance No.* 12 *of* 1840—"*Probable claim or pretence of title.*"

In what cases the summary proceedings under the Ordinance No. 12 of 1840 are applicable, is pointed out.

D. C., Negombo, 11,388. *Buller* v. *Sadris Mendis* ... 134

2.—*Crown land, possession of, without right—Proceeding to recover—Ordinance No.* 12 *of* 1840, *sect.* 1—*Onus probandi*—"*Probable claim.*"

In a proceeding under Ordinance No. 12 of 1840 to recover Crown land unlawfully taken possession of by the defendant, the burden is on the plaintiff to show *primâ facie* that (1) the defendant had entered or taken possession without any probable claim or pretence of title, and that (2) the defendant had not cultivated, planted or otherwise improved and otherwise held uninterrupted possession of such land for five years.

D. C., Kandy, 6,108. *The Queen* v. *Habeboo Mahamadoo* 129

3.—*Crown land—Presumption in favor of Crown—Ordinance No.* 12 *of* 1840, *sect.* 6.

The presumption in sect. 6 of Ordinance No. 12 of 1840 only arises in cases to which the Crown is a party, and therefore, in a case between private parties, when the plaintiff admitted that he held neither sannas nor grant of any kind, and that no taxes or services had been paid or rendered for the same,

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Held, that the plaintiff was wrongly non-suited.

Quaere, whether, comparing them with the first part of the clause, the words in sect. 6, "and not to be the property of any person claiming the same against the Crown," have not crept into the Ordinance *per incuriam*.

D. C., Kurnegalle, 10,277. *Mulkaduwawe* v. *Rang Ettena* 25

Damages.

Damages—Unlawful imprisonment—Acquiescence.

Where the defendant was not justified in keeping plaintiff in the stocks all night, but plaintiff had refused to come out when desired by defendant,

Held, that plaintiff was not entitled to damages.

D. C., Colombo, 9,371. *Fernando* v. *Coulthard* 5

See ANIMAL.
DEFLORATION.
PROCTOR, 6.
TATTAMAROO.

Death of party.

See ARBITRATION.
EXECUTION, 1.
PARTY, 1, 2.

Defamation.

1.—*Defamation—Pleading—R. & O., 5th July* 1842, r. 1—*Inconsistent pleas—Justification as truth—Kandyan law—Casus omissus.*

Where an action is brought in a court other than that of the district in which the cause of action arose, on account of the judge of the latter court being a party to the action, the case is to be governed by the law of the district where the cause of action arose. Where such law is the Kandyan law, and it is silent on the subject, the case must be governed, not by the English law, but by the rules of natural equity and right, and the court in applying these will take as its guide the principles of equity as administered in the courts in England.

In an action for defamation, the pleas of the general issue and of justification, though inconsistent, may be pleaded under rule 1 of R. and O. of 5th July 1842.

In such an action it is sufficient to give the substance only of the oral statements on which the defamatory matter is justified.

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The simple plea of truth is no justification of a libel. To be a justification it must be stated and shown that the truth was uttered without malice and for a lawful purpose.

D. C., Colombo, 3,360. *Perera* v. *Morris* ... 92

2.—*Defamation—Slander—Malicious intent—Kandyan Provinces, law of.*

By the Roman Dutch law, a malicious intent is necessary to constitute a verbal injury.

D. C., Kandy, 22,249. *Lakeman* v. *Bain* ... 160

3.—*Defamation—Privileged communication—Letter about one member written by another to Committee of Club.*

Plaintiff a member of a club claimed damages for a libel contained in a letter written by defendant, another member, to the Committee of the Club, in which he called plaintiff a liar. This letter was written upon the committee demanding of defendant an explanation of his conduct in posting on the walls of the club a placard declaring plaintiff to be a liar.

Held, reversing the nonsuit entered below, that the letter in question was not a privileged communication, and that, without entering into the truth of the libellous matter, the defendant was not justified in giving that matter such publication, and that plaintiff was therefore entitled to damages.

D. C., Kandy, 25,990. *Parsons* v. *Selby* ... 52

Default.

See JUDGMENT 1, 2, 3.

Defloration.

Defloration, action for damages for.

In order to maintain an action for defloration it is not necessary that plaintiff should make oath of previous virginity, nor need the libel allege it.

The oath of defendant, denying promise to marry, is not admissible here, because not admissible in the same form of action in England [until 9 and 10 V., c. 95.]

D. C., Colombo, 35,800. *Dias* v. *Perera*... ... 14

Demurrer.

1.—*Demurrer, general.*

Since the new rules of the 5th July 1842 it has not been the practice of the district court of Colombo to allow general demurrers, excepting to the sufficiency of the libel in general terms without showing specially the nature of the objection.

D. C., Kandy, 16,016. *Wise* v. *Ibrahim Sahib* ... 9

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2.—*Demurrer over-ruled—Leave to plead over.*

Where the court below had over-ruled a demurrer to an answer and given leave to the party demurring to plead to the merits, according to the practice of the court,

Held, that the practice of the court was a sufficient ground, and that the rules of pleading in this colony having in view an explicit statement of all facts of the case which are material to a just judgment on the merits, it would be contrary to those rules to give judgment in the present stage of the case, two valid defences being disclosed on the record.

D. C., Kandy, 19,630. *Mahamado* v. *Assena Marikar*... 83

3.—*Demurrer to libel—Leave to amend—Payment of costs—R. & O. of 5th July 1842, sect. 4.*

Where a district court upon demurrer held the libel bad, giving no costs of demurrer, and permitted plaintiff to amend within 8 days, without directing payment of costs consequent upon amendment,

Held, that the terms imposed were warranted by sect. 4 of the Rules of Practice of 5th July 1842, and were in the discretion of the judge.

D. C., Galle, 12,030. *Sinne Lebbe* v. *Meera Lebbe* ... 71

See EJECTMENT, 1.

District Court.

1.—*District Court—Ultra vires—Res judicata, avoidance of.*

The district court, upholding a plea of *res judicata*, yet held there were circumstances entitling the plaintiff to relief from it, and ordered the filing of an amended answer. This order was affirmed by a judge on circuit, and the cause came for trial before another district judge, who upheld the plea of *res judicata* and nonsuited plaintiff.

Held, that the question of *res judicata* was not now open, and that the nonsuit was wrong.

D. C., Caltura, 13,252. *Natchia* v. *Casy Lebbe* ... 152

2.—*District Court—Power to commit administrator to gaol in default of filing account—Absence of assessors—Irregularity.*

A district court has no power to order that an administrator "be imprisoned, if he does not file a satisfactory account within a given time, in default to be committed to gaol." No assessors having been present when this order was made, it was set aside as irregular.

D. C., Trincomalie, 17,542. *Re Teywane* ... 166

See COSTS, 3.
JUDGMENT, 1, 5.

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Donation.

1.—*Donation by parent to child* in potestate—*Roman Dutch law —Local custom to the contrary.*

By the Roman Dutch law a parent cannot legally make a donation to his minor child who is still under his tutelage, but a person contending for such a power may prove a local custom superseding the written law.

D. C., Jaffna, 4,347. *Sidembren* v. *Ayenpulle* ... 114

2.—*Donation—Necessity for acceptance appearing on deed—Marriage, date of—Registration.*

The acceptance of a donation may be proved any way, and need not be in writing, nor appear on the face of the instrument.

A marriage among natives is not constituted by registration *per se*, and it may admit of doubt whether in any case the marriage dates from the registration.

D. C., Tangalle, 1,174. *Tillekeratne* v. *Tennekoon* ... 155

3.—*Donation on condition of rendering services—Inheritance of donated land by heirs.*

Where a donation is made subject to the rendering of service by the donee to the donor, the custom is for the donee to send one or more servants to wait upon the donor, to supply provisions and medicine, and procure burial according to his ability, the condition of the party and value of the land; and the services not being expressed to be performed by the donee personally, his heirs although not named in the deed, take by law on his death an interest in the condition and may perform it.

D. C., Kornegalle, 12,121. *Kuda* v. *Dingo* ... 159

See MORTMAIN LAWS.

Double costs.

See JUDGMENT, 5.

Ejectment.

1.—*Ejectment—Form of libel—Demurrer founded on prescription—Ordinance No.* 21 *of* 1844.

The fictitious action of ejectment is unknown to the law of this Island. A libel is not demurrable by reason of the Ordinance No. 21 of 1844, but the objection should be pleaded in bar, as under an Ordinance for the limitation of actions.

D. C., Galle, 11,864. *Bastian* v. *Siman* 64

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2.—*Ejectment—Description of subject matter in libel—Pleading.*

Where the libel set forth that plaintiffs were "seised and possessed as of their own property of, &c."

Held, that this averment left it uncertain whether plaintiffs claimed right of property or of possession only, and that libel must be amended.

Held also, that "Maha Bandarawatte" was an insufficient description of a land from which ejectment of the defendants was prayed.

D. C., Amblangodde, 4,497. *Babachy* v. *Leonis* ... 13

See AGREEMENT.
BUDDHIST ECCLESIASTICAL LAW, 1.
SERVICE TENURES.

Evidence.

1.—*Evidence—Witness, competency of—Objection after examination.*

It is too late to question the competency of any witness after the party has permitted the examination to proceed.

C. R., Colombo, 12,807. *Middleton* v. *Jansz* ... 118

2.—*Evidence—Commission to examine witnesses abroad—Materiality—Affidavit of.*

Observation on the procedure to obtain a commission for the examination of witnesses abroad.

D. C., Kandy, 19,362. *Anstruther* v. *Arabin* ... 76

3.—*Evidence—Commission to examine witnesses—Ordinance No. 3 of 1846, sect. 7—Pleadings—Costs, division of.*

Observations on the object and form of pleadings and on the procedure to be adopted in issuing commissions for the examination of witnesses abroad.

Where any novel point arises, and precedents are conflicting, it is the invariable practice of the Supreme Court in appeal to divide the costs.

D. C., Kandy, 19,362. *Admors. of Mackenzie* v. *Arabin* 66

4.—*Evidence—Counterpart documents executed contemporaneously—Duplicate originals.*

Where a bond was executed in triplicate, one copy given to the obligee, one attached to the notary's protocol, and one filed in the district court (though such filing was not required by law:)

Held, that upon an indictment for perjury, where the signature to the bond was in question, the copy filed in the district court might

be produced in evidence without accounting for the absence of either of the other copies.

The Queen v. *Juanis* 181

5.—*Evidence—Husband and wife—Marriage not registered under Regulation* 9 *of* 1822 [*Ordinance No.* 6 *of* 1847, *No.* 13 *of* 1863]—*Evidence of wife.*

In a charge of murder, the prisoner's wife was examined for the prosecution. She was married according to Sinhalese custom, but the marriage had not been registered under Regulation 9 of 1822.

Held, upon motion in arrest of judgment, that such marriage was invalid only for the purposes specified in sect. 3 of the Proclamation, and that the woman's evidence was inadmissible, and the conviction must be set aside.

The Queen v. *Dingy Appu* 138

6.—*Evidence—Statement of prisoner on oath—Admissibility at trial—Ordinance No.* 15 *of* 1843, *sect.* 23 [*Ordinance No.* 11 *of* 1868, *sect.* 143]—*Appeal to Queen in Council—postponement of sentence.*

Upon the trial of an indictment for theft, the prosecution read in evidence the deposition of the prisoner made on oath at a time when no person had been charged with the crime. This having been objected to, the prosecution put in the prisoner's statement (made to the justice after he was charged) in which he referred to his deposition as containing what he had to say in his defence. The evidence was left to the jury, who convicted the prisoner.

Held, upon a case reserved, that by the English law the prisoner's deposition was admissible; and that when by the reading of the prisoner's subsequent statement the objection was removed, the deposition need not again have been read to the jury.

Held also, that under sect. 23 of Ordinance No. 15 of 1843, witnesses were only compellable to answer questions that were legally demandable, and not such as would tend to criminate them.

The points raised having been fully argued in court and solemnly determined, the court unanimously refused to postpone the sentence on the prisoner pending appeal to Her Majesty in Privy Council.

The Queen v. *Sinne Lebbe* 144

7.—*Evidence—Receipted account particulars—Delivery of receipt.*

Where plaintiff sued for goods sold and delivered, which defendant pleaded he had bought in discharge of a debt due to him from plaintiff; and at the trial the account particulars produced by plaintiff bore the indorsement "received payment" signed by the plaintiff; whereupon the court below gave judgment for defendant;

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Held, that, there having been no delivery of the receipt and no consideration therefor, the receipt did not estop plaintiff, nor warrant the judgment for the defendant.

C. R., Nuwera Eliya, 897. *Don* v. *Perera* ... 121

8.—*Evidence—Rebutting evidence—Right of reply.*

Where defendant called evidence to contradict his receipt produced by plaintiff, plaintiff was entitled to call evidence in rebuttal, without giving defendant the right of reply.

D. C., Galle, 15,779. *Tamby Saibu* v. *De Silva* ... 54

9.—*Evidence—Large number of witnesses.*

A court is not bound to hear a long list of witnesses when satisfied their story is false, but it ought to examine a sufficient number to preclude the possibility of their having been bought over by the other side.

P. C., Jaffna, 9,136. *Armogam* v. *Wayrewen* ... 107

See ACCOUNT STATED.
ARREST IN MESNE PROCESS. 1.
CONSIDERATION.
JUDGMENT, 3.
KANDYAN LAW, 1.
WITNESS, 2.

Exaggeration of claim.

Exaggeration of claim—Recovery according to title—Secundum probata—Costs.

Though a plaintiff claims more than he is entitled to, he must recover "according to his title"; and should not be non-suited for proving less than he claimed, though in gross instances he may be deprived of costs.

D. C., Colombo, 36,718. *Pottooma Natchia* v. *Sinnachy* 33

Examination of parties.

1.—*Examination of parties—Discretion of court—Commission—R. & O.* 1833, *sect.* i, rr. 29, 31—*Ordinance No.* 3 *of* 1846 *sect.* 7.

It is in the discretion of the court to permit or refuse the examination by one party of the other, whether the application be made under R. & O. of 1st October 1833, sects. 1, rr, 29, 31 or under sect. 7 of Ordinance No. 3 of 1846, which last enables the court to issue a commission for such examination.

D. C., Jaffna, 14,036. *Moorgappa Chetty* v. *Comarasamy* 78

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2.—*Examination of party to suit—Attendance in court—Moorish female—R. & O.* 1833, *sect.* i, *rule* 29.

The district court has power, upon the application of a party to a suit, and in the exercise of its discretion, to order the attendance in court of an adverse party for examination *vivâ voce*, although such adverse party be a Moorish female, and as such averse to appearing in public.

D. C., Jaffna, 1,894. *Sagoona* v. *Mahamadoo* ... 85

3.—*Examination of parties—R. & O.* 1833, *sect.* i, rr. 29, 31—*Ordinance No.* 12 *of* 1843, *sect.* 14. [*Ordinance No.* 9 *of* 1852, *sect.* 14.]

The mutual examination of parties to a suit may be allowed at any time by the court, if it thinks fit, with all the latitude of cross-examination.

D. C., Chilaw, 14,526. *Bawa Markar* v. *Meera Saiboo* 117

4.—*Examination of parties before issue joined—R. & O.* 1833, *sect.* i, rr. 29, 31—*Ordinance No.* 12 *of* 1843, *sect.* 14, [*Ordinance No.* 9 *of* 1852, *sect.* 3.]

The court may at any time it sees fit allow the mutual examination of parties with all the latitude of cross-examination.

D. C., Kandy, 20,044. 137

Exceptio non numeratæ pecuniæ.

See BOND.

Execution.

1.—*Execution by survivor of two or more plaintiffs.*

If after judgment and before execution one of the plaintiffs dies, survivors make take out execution in the name of all, or stating death of one plaintiff may take out execution in the name of the survivors.

D. C., Manaar, 2,054. *Awuker Lebbe* v. *Mamel Tamby* 36

2.—*Execution sale, proceeds of—Contending claimant—Preference and concurrence.*

Proceeds of an execution sale, when *in custodia legis* and not paid over to the creditor who took out execution, forms a fund for the benefit of all creditors, and not only of that one who effected the sale in execution; and such proceeds cannot be paid over till preference or concurrence of claims has been determined.

D. C., Jaffna, 4,011 & 10,939. *Buller* v. *Racket* ... 2

See ABATEMENT.

PRACTICE, 11.

Executor.

1.—*Executor de son tort—Liability beyond assets received.*

By the Dutch law persons other than the heirs who meddle with the property of a deceased person are not liable for more than their intromissions.

D. C., Galle, 14,879. *Don Nicholas* v. *Justina* ... 58

2.—*Executor, sole, practice on death of—Right to administration.*

Where appointment of executor fails by death of sole executor before probate, the will should be proved as otherwise, and administration *cum testamento annexo* granted to residuary legatee or person having greatest interest under the will.

D. C., Ratnapura, 85. *In re Pahalawette.* ... 32

3.—*Executor, contract by—Co-executors—Joinder as plaintiffs.*

Where an executor has entered into a contract in his own name, and not expressly as agent also for his co-executor, or on behalf of the estate, the other executor need not be joined as plaintiff in an action upon the contract.

D. C., Galle, 14,919. *Allima Umma* v. *Silva* ... 123

4.—*Executor, action against, on testator's bond—Administration.*

Plaintiff, widow of a usufructuary mortgagee, sued the executor of the mortgagor on the mortgage bond, alleging continuous possession of the land mortgaged from date of bond. At the trial it appeared that the mortgagee's estate had been administered and closed by his surviving brother, who had made no mention of the present debt in his inventory. The district judge absolved the defendant, apparently believing the debt satisfied from its omission in the inventory and plaintiff's waiting two years after mortgagee's estate closed to bring this action.

In *appeal*, new trial ordered. Omission from inventory may be administrator's fault, as plaintiff alleges having got the bond at close of estate. Plaintiff has made out a *primâ facie* case to call for the defence.

D. C., Colombo, 11,176. *Livera* v. *Domingo Peris* ... 30

Executor de son tort.

See EXECUTOR, 1.
PARTY, 2.

Ex parte trial.

Ex parte hearing—R. & O. 17th June 1844, *rule* 4—*Defendant's presence—Admission of debt during party's examination.*

Where defendant in his examination as a party admits the debt sued on, the plaintiff should have judgment without further proof.

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Whenever under rule 4 a plaintiff is required to adduce further evidence, the defendant has a right to be present and to cross-examine plaintiff's witnesses. For the purpose of leading such evidence plaintiff has a right to expect some early day to be named, and the case should not to be set down on the trial roll.

D. C., Kandy, 19,642. *Hamilton* v. *Ross* ... 78

See PRACTICE, 9.

False accusation.

False accusation—Ordinance No. 15 *of* 1843, *sect.* 18 [*Ordinance No.* 11 *of* 1868, *sect.* 166]—*False affidavit.*

Where upon a charge of "wilfully making a false accusation against one Calingoorale for cattle stealing before the justice of the peace," it appeared that the false information was contained in an affidavit,

Held, that the offence was not punishable under sect. 18 of Ordinance No. 15 of 1843.

P. C., Kaigalle, 1,145. *Queen* v. *Punchyraale* ... 80

False case.

False case—Dismissal without evidence.

A judge has no right to dismiss, without evidence or examination of parties, a case which he suspects to be false.

C. R., Jaffna, 2,607. *Ibrahim* v. *Awokker* ... 99

False imprisonment.

False imprisonment—Police Court, jurisdiction of.

It is clearly competent to a police court to try a charge of false imprisonment.

P. C., Galle, 12,438. *Batchy Hamy* v. *Casy Lebbe* ... 165

Felony.

See MINOR.

Fiscal.

1.—*Fiscal's sale—Schedule of Udear, necessity for, before seizure—Ordinance No.* 1 *of* 1842.

Upon writ of execution issued in the Northern Province, the writ-holder must produce to the fiscal a schedule of the Udear for the land proposed to be levied on, before the fiscal can be required to seize in execution of the writ (*Per* CARR and STARK, J. J., *dissentiente* OLIPHANT, C. J.)

D. C., Jaffna, 2,599. *Toussaint* v. *Veerapatran* ... 166

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2.—*Schedule for fiscal's sale of land, custom regarding.*

Observation on the points to be established before it can be held that a fiscal cannot sell land in execution without a schedule, there being no provision on the point in the fiscal regulation.

D. C., Jaffna, 2,599. *Toussaint* v. *Chettiar* ... 149

Forfeiture.

See PRINCIPAL AND SURETY, 1.
RECOGNIZANCES.

Fraud.

Fraud, pleading of—Presumption against fraud.

Where plaintiff charges fraud and irregularities in the conduct of a fiscal's officer in the conduct of a sale in execution, he must set out the particulars of the fraud and of the irregularities complained of.

D. C., Colombo, 13,135. *Perera* v. *Perera* ... 113

See PARTITION, 1.

Gems.

See TATTAMAROO.

Guarantee.

See STAMP, 4.

Handwriting.

See WITNESS, 2.

Heirs.

See PARTY, 1, 2.

Highway.

Highway—Prescription—Presumption of lost grant—Survey, marginal notes on.

The public highway cannot be prescribed for by a private person by virtue of any length of possession, and the court will not presume a lost grant, as no grant can divest the public of their right to a highway.

D. C., Colombo, 123. *The Queen* v. *Cowasjee Eduljee*... 105

Hindoo temple.

Hindoo temple—Disputed title—Onus probandi.

Where plaintiff prayed to be restored to the possession of a temple as lawful incumbent, which right defendant alleged to be in himself, and plaintiff joined issue,

Held, that the plaintiff should first call evidence.

D. C., Jaffna, 6,123. *Ramalinger* v *Cadiramer.* ... 52

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Husband and wife.

See EVIDENCE, 5.
RES JUDICATA.
THESAVALAME, 1.

Huwanderam.

Huwanderam—Rights of Vidahn and Mayoraal.

Where there is a Vidahn Aratchy as well as a Mayoraal in a village, the *huwanderam* perquisite divides in different proportions between them. Where a village has only a Mayoraal (the plaintiff), he is not entitled to take the whole without shewing that he performed the duties of both offices.

D. C., Matura, 17,581. *Dondricko* v. *Siman* ... 44

Illegal contract.

See CONTRACT, 1.
CHAMPERTY.

Imprisonment, unlawful.

See DAMAGES, 1.

Inconsistent pleas.

See DEFAMATION, 1.

Indictment.

1.—*Indictment—Description of person—Ordinary name—"Gey" name.*

In laying the property of things stolen it is sufficient to give the ordinary name of the owner, without stating his "gey" name, and the court will not narrow the English rule on this point.

The Queen v. *Waitte* 157

2.—*Indictment—Variance—Amendment—R. & O. 6th Dec.* 1845.

In an indictment against a notary for fraudulently omitting to seal and sign a deed of sale executed before him, the instrument was described as "notarial" before setting out its purport. The evidence showing that the deed was incomplete, the court over-ruled a motion in arrest of judgment, holding that though the rules of 6th December 1845 admitted only such objections as are recognised in England, it did not declare all such objections tenable in Ceylon; and the court would always on such technical objections see whether the accused had been prejudiced by the matter objected to.

No. 6. *The Queen* v. *Harmanis de Soyza* 135

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3.—*Indictment—Assault and robbery—Conviction of assault only.*

Held (*Per* OLIPHANT, C. J., and STARK, J., *dissentiente* CARR, J.), where a prisoner had been tried upon the usual indictment for robbery, which contained a substantive charge of assault, and convicted of assault only, that it was competent to the jury so to convict him.

The Queen v. *Kappa Kando* 179

See ARREST OF JUDGMENT.

Inheritance.

See BUDDHIST ECCLESIASTICAL LAW, 3.
DONATION, 3.
KANDYAN LAW, 2, 3, 4, 5.

Injunction.

1.—*Injunction—Practice in district court—Filing libel.*

The district court can only grant an injunction after libel duly filed. The Supreme Court set aside for irregularity an injunction issued by a district judge after he had himself received the libel out of due course in chambers.

D. C., Ratnapoora. 6,508. *Pattale* v. *Kankanewe* ... 44

2.—*Injunction—Necessity for commencing proceedings before issue—Injunction against administrator selling immoveable property.*

A mere assertion in an affidavit that a party is entitled to land, without further proceedings, will not justify a court in issuing an injunction to prevent an administrator selling such land. In cases where irremediable damage is to be apprehended if the party were to adopt the regular course of proceedings, the court may issue an injunction without such proceedings.

D. C., Ratnapoora, 107. *Re G. Dingerehamy* ... 116

3.—*Injunction* pendente lite *to remove obstruction to road*—In statu quo.

In an action to have an obstruction to a private carriage way removed, the right to the road being in issue, the district court had granted an injunction against defendant for the removal of the obstruction *pendente lite.*

Held, that injunctions are usually granted to preserve property, pending a trial, and to leave matters in their present state until the rights of parties are decided; and in the present case, if the injunction were allowed to stand, and defendant eventually succeeded, he could not be placed *in statu quo;* and that the injunction must therefore be dissolved.

D. C., Galle, 12,671. *Barton* v. *Perera* 89

In solidum liability.

See COSTS, 2.
JUDGMENT, 6.

Insolvency.

1.—*Insolvency—Ordinance No.* 6 *of* 1835, *sect.* 41—[*Ordinance No.* 7 *of* 1853.]

The Crown, not being expressly mentioned in Ordinance No. 6 of 1835, is not bound thereby, though it may avail itself of its provisions; and a debtor to the crown is not released by proceedings under that Ordinance.

The 41st clause of the Ordinance entitles the debtor to discharge from the debt for which he has been confined; and such debt being here one to the Crown, he cannot obtain that release, nor can he, in this suit, ask to be discharged from liability to other creditors not parties to the suit.

D. C., Kandy, 21,663. *Selby* v. *Fernando* ... 47

2.—*Insolvency—Assignee liable for appraiser's expenses—Ordinance No.* 6 *of* 1835 [*Ordinance No.* 7 *of* 1853]

Under the [repealed] Ordinance No. 6 of 1835, the assignee in insolvency, and not the petitioning creditor, was liable for the expenses of appraising the insolvent's property.

D. C., Colombo, 6,119. *Re Francis Hudson* ... 108

3.—*Insolvency—Order on assignee to pay money to appraisers—Separate action to recover such money.*

Where the district court ordered the assignees of an insolvent estate to pay to the appraisers of the estate their expenses and, the assignees failing to pay, the appraisers sued them for the expenses :

Held, that the action was maintainable, and plaintiffs were not restricted to any summary mode of procedure.

D. C., Colombo, 8,161. *Jumeaux* v. *Thompson* ... 109

Interest.

1—*Interest—Patent ambiguity as to rate.*

Where a bond carried "two per cent" interest, and the district court decreed that rate *per mensem*,

Held, that the Supreme Court could not presume from the patent ambiguity that either "per annum" or "per mensem" was meant, and that plaintiff should recover the legal rate of interest.

D. C., Manaar, 4,824. *Mironde* v. *Markoe* ... 44

2.—*Interest equal to principal.*

Although, when interest is in arrear, only a sum equal to the principal can be recovered as interest, this rule does not obtain when

the interest is not in arrear, in which latter case the amount of interest already paid may exceed many times the principal, and the plaintiff be still entitled to recover a sum equal to principal, as interest.

C. R., Jaffna, 275. *Sedembranader* v. *Sangerapulle* ... 19

3.—*Interest exceeding principal—Usufructuary mortgage—Profits.*

A plaintiff suing on a usufructuary mortgage cannot recover a larger sum than the principal, whether as interest *nominatim*, or as profits of the mortgaged property not enjoyed.

D. C., Chilaw and Putlam, 12,616. *Seneweratne* v. *Don Bastian* 154

Intervention.

1.—*Intervention.*

A third party considering that his interest will be affected by a pending suit has a right to intervene in that suit. Such intervention may be lodged at any stage of the case—even after judgment, if an appeal lies—provided the proceedings are not deranged by it.

D. C., Matura, 18,321. *Siman* v. *Siman* 56

2.—*Intervention—Roman Dutch law—R. & O. of 1st October 1833, sect.* 1, r. 32.

A person wishing to intervene must obtain the leave of court after showing a probable interest, and cannot (by the R. D. Law) set up a different right from the plaintiffs and defendants, though the R. & O. allow greater laxity in favor of intervention. An intervenient must take up the suit at the stage in which he finds it, and having by his intervention become a party, is bound by the judgment.

D. C., Chilaw, 13,115. *Pelis* v. *Siman* 64

3.—*Intervenient—Nonsuit.*

An intervenient, who intervenes to justify the title of the defendant, cannot be nonsuited.

D. C., Colombo, 8,563. *Silva* v. *Perera* 6

See STAMP, 1.

Joint and several liability.

See COSTS, 2.
JUDGMENT, 6.

Judgment.

1.—*Judgment by default, setting aside—District Court setting aside its own final judgment.*

Where defendant appeared with a proctor and showed cause against judgment by default being entered against him,

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Held, that he was thereby precluded from setting up the only reason for revoking the judgment, viz. his having been prevented, by accident or misfortune or by not having received notice of the proceedings, from appearing in due time.

D. C., Colombo, 35,663. *Sultan Saibo* v. *Sinne Pulle* 5

2.—*Judgment by default—R. & O., 5th July* 1842, r. 9—*Motion for judgment by default.*

A rule *nisi* is not necessary for obtaining judgment by default, which may be obtained on motion, of which "the court must be satisfied that the party in default has had proper notice." This notice does not require the assent of the court before it be served.

D. C., Colombo, 2,034. *Arkadie* v. *Schubert* ... 72

3.—*Judgment by default—Title to land in issue—Evidence for plaintiff—Barring defendant.*

The R. & O. empower the district court to receive evidence for plaintiff on his motion for judgment by default, and the Supreme Court has decided that such evidence should always be required when the title to land is in issue.

A defendant in default is actually barred, and no rule is necessary to bar him, but rather for judgment by default.

D. C., Jaffna, 6,229. *Sidemberanader* v. *Sidemberanader* 58

4.—*Judgment on admission—Confession of agent—Authority to bind principal.*

Observations on the authority of a general agent, managing property in this country, to receive process and to confess judgment against his principal.

D. C., Colombo, 4,118. *The Bank of Ceylon* v. *Arabin* 102

5.—*Judgment, final—Power of a court to alter—Double costs.*

The district court has no power to alter its final decree in the cause, nor can it, where it imposes a penalty for contempt, remit such penalty on a subsequent day.

It is illegal to award double costs, as a fine is the proper mode of pecuniary punishment, and the money is payable to the Queen and not to a private party at the discretion of the court, unless otherwise enacted by Ordinance.

D. C., Kurunagala, 9,015. *Kirri Manika* v. *Namberale* 82

6.—*Judgment, liability of defendants upon—Joint and several contract.*

Where a plaintiff obtained judgment for a sum of money against two defendants as heirs of the deceased obligor,

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Held, that he could only recover under it according to the legal liabilities of the parties.

Although parties have bound themselves jointly and severally for the whole debt, the creditor cannot in the first instance sue any one of them for the whole debt, but he must first discuss each debtor for his proportionate share, and may recover the shares of those who are unable to pay from the other debtors.

C. R., Mallagam, 591. *Vyravipulle* v. *Velyther* ... 116

See NEW TRIAL.
NON-JOINDER.
PETITION OF APPEAL, 3.
PRACTICE, 11.

Jurisdiction.

See COURT OF REQUESTS.
FALSE IMPRISONMENT.
POLICE COURT.
RECOGNIZANCES.
RENT.
SURVEY, 1, 2.

Justice of the Peace.

See RECOGNIZANCES.

Kandyan law.

1.—*Adoption—Kandyan law—Evidence.*

That defendant and the deceased addressed each other as "father" and "son" is not conclusive evidence of adoption. Though there are no prescribed forms of adoption under Kandyan law, yet strict proof of public declaration of adoption and of intention to institute as heir is required.

D. C., Colombo, 3,569. *Wedda* v. *Balia* 1

2.—*Deega marriage—Succession to father's estate—Kandyan law.*

A deega married daughter does not forfeit, in favor of brothers and sisters of the half blood, her right to inherit from her father. Difference between Saffragam and Udderatte customs on the point.

D. C., Kandy, 1,333. *Mooto Menika* v. *Tikeri Menika* 1

3.—*Kandyan law—Beena and deega marriages—Widow marrying out her daughter in deega.*

A Kandyan widow may marry out her daughter in deega, upon which such daughter will forfeit her right to inherit her father's lands.

D. C., Kandy, 19,931. *Ukkoo Hamy* v. *Appu* .. 156

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4.—*Kandyan law—Inheritance.*

The only child of a Kandyan by his first wife, although given out in deega, is entitled to a half of her father's lands, the other half devolving on the children of the second bed.

D. C., Badulla, 14,311. *Menika* v. *Kiri Banda* ... 54

5.—*Kandyan law—Inheritance*—Per stirpes *or* per capita.

Application of the rule of *per stirpes* or *per capita* to inheritance under the Kandyan law considered.

D. C., Matella, 3,574, and D. C., Kandy (north) 1,333 (page 1) considered.

D. C., Kandy, 20,898. *Ukkua* v. *Tikiry* 160

See DEFAMATION, 1, 2.
MOHAMMEDAN LAW.
PROVISIONAL JUDGMENT, 1.
RES JUDICATA.

Lex commissoria.

See APPEAL, 2.

Maintenance.

Maintenance—Ordinance No. 4 *of* 1841, *sect.* 3—*Beena marriage.*

Every man is liable under the 3rd clause of the Ordinance No. 4 of 1841, who being able wholly or in part to maintain his family, leaves his wife or child, legitimate or otherwise, without maintenance or support, whereby they become chargeable to others; and there is no exception in the case of a beena marriage when they are thrown upon others for support.

P. C., Nuwera Eliya, 2,827. *Rang Manika* v. *Punchi Banda* 61

See CHAMPERTY.

Majority.

Majority—Mohammedan and Roman Dutch law.

According to Mohammedan law, majority is attained after the expiration, or at the completion, of the 16th year; and by the Dutch law the parental power ceases by tacit or direct emancipation, when the child with the knowledge of the parent takes up residence elsewhere and openly exercises any trade or calling.

D. C., Galle, 11,238. 133

Malicious injury.

1.—*Malicious injury—Ordinance No.* 6 *of* 1846, *sect.* 17—*Claim of right.*

Where defendants, chaged with destroying a fence placed across a path, justified their act by claiming a right of way,

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Held, that they could not be convicted under the *Malicious Injuries Ordinance*, 1846, without evidence taken on their plea.

P. C., Jaffna, 7,322. *Gratiaen* v. *Cander* ... 102

2.—*Malicious injury—Ordinance No.* 6 *of* 1846, *sect.* 3—*Sentence—Discretion of court.*

Held per Curiam (*dubitante* Starke, J.) that the sentence on prisoners convicted under clause 3 of the *Malicious Injuries Ordinance*, 1846 must include corporal punishment with transportation or imprisonment.

Per STARKE, J.: Where an ordinance declares an offender liable to two or more punishments, such liability is in the nature of a maximum punishment, and it is in the discretion of the court to award one of the punishments only.

The Queen v. *Abe* 50

Martial law.

See PROCLAMATION, 1.

Master and pupil.

Master and pupil—Reasonable correction.

Where a police court had convicted a schoolmaster of assault and battery on a pupil, but found that the "conduct of the complainant, on his own showing, was very disorderly on the occasion in question and quite subversive of discipline which must be maintained in well regulated schools, and that it would have been dereliction of duty on the part of defendant had he allowed the complainant to pass with impunity:"

Held (setting aside the conviction) that a schoolmaster was under the circumstances justified in using such reasonable correction as was necessary for the maintenance of due discipline.

P. C., Colombo, 7,672. *Vanderstraaten* v. *Lister* ... 99

Master and servant.

Master and servant—Ordinance No. 5 *of* 1841, *sect.* 7 [*Ordinance No.* 11 *of* 1865, *sect.* 11]—*Peon of district court*—"*Menial or domestic servant.*"

A peon on the establishment of the district court is not punishable, under sect. 7, Ordinance No. 5 of 1841, for absenting himself from duty without permission, not being a "menial or domestic servant."

P. C., Ratnapura, 1,376. *Megnort* v. *Allis Pulle* ... 112

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Maxims.

Certum est quod certum reddi potest.
See COSTS, 4.

Ex turpi causa non oritur actio.
See CONTRACT, 1.

Interest reipublicæ ut finis sit litium.
See NONSUIT.

Mayoraal.

See HUWANDERAM.

Minor.

Minor of 7 or 8 years old—Mischievous discretion—Felony.
Within the age of 7 years no infant can be found guilty of felony, and between 7 and 14 he is presumed to be innocent in the absence of strong evidence of mischievous discretion. The first prisoner (a boy of 7 or 8 years old) having been concerned with the two other prisoners, the Supreme Court set aside the conviction and sentence on him.
D. C., Tangalle, 130. *The Queen* v. *Dowan* ... 59

See COSTS, 1.
WILL, 1.

Mohammedan law.

Mohammedan law—Kandyan provinces.
The Moors resident in the Kandyan provinces are governed by the Mohammedan law.
D. C., Kandy, 23,519. *Saiboo Tamby* v. *Ahemet* ... 163

See MAJORITY.

Moorish parties.

See ADMINISTRATION, 1.
EXAMINATION OF PARTIES, 2.
MOHAMMEDAN LAW.

Mortgage.

1.—*Mortgage, usufructuary—Possession of a divided half by each of two mortgagees—Payment.*
Where two mortgagees each lent an equal sum to two mortga-

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gors, taking as security a piece of land to possess as the mortgagees wished; and the mortgagees possessed each a divided half; and, on one of the mortgagees receiving payment of his advance, he put the mortgagors in possession of the specific half possessed by him, but the remaining mortgagee entered upon the half so given up, claiming right so to do,

Held, that he had no right to occupy more than the half he elected to possess.

D. C.. Chilaw and Putlam, 7,521. *Calu Appu* v. *Saibo* 15

2.—*Mortgage bond—Possession in lieu of interest—Prescription.*

Plaintiff as mortgagee had possessed in lieu of interest (under his bond) a share of a field, mortgaged as security;

Held, that the bond was not prescribed [under Ordinance No. 8 of 1834.]

C. R., Galle, 526. *Abeyewardene* v. *Madoma* ... 25

See APPEAL, 2.
PAWN.

Mortmain laws.

Mortmain laws—Proclamation of 18*th September* 1819*—Ordinance No.* 2 *of* 1840 [*disallowed.*]

The gift of property *ad pios usus* is not prohibited in the Maritime Provinces, the Statutes of Mortmain not extending to the colonies.

Where such gift is by deed to a particular church, the priest managing such church and its property is entitled to sue on such deed.

D. C., Batticaloa, 9,523. *Godinho* v. *Koning* ... 132

Murder.

Murder—Resistance to arrest—Private person arresting—Ordinance No. 15 *of* 1843, *sect.* 11 [*Ordinance No.* 11 *of* 1868, *sect.* 147.]

Power of private persons to arrest on suspicion of crimes discussed.

The Queen v. *Ama Lebbe* 157

New trial.

New trial by consent—Contradictory judgments in a suit by one court.

Where plaintiff got judgment, and pending appeal the evidence taken and the judgment were abstracted from the record, and plaintiff consented to a new trial in which he was non-suited,

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Held, that such proceedings were tantamount to a new trial by consent of both parties, and that a court of appeal would not disturb the second judgment on the ground of there having been a previous judgment of the same court in the same cause.

D. C., Kandy, 11,266. *Ukku Ettena* v. *Omar Lebbe* 12

Next friend.

See COSTS, 1.

Non-joinder.

Non-joinder of parties—Amendment—Judgment for shares of land proved.

If at the trial it appears that proper parties are omitted, it is discretionary with the court either to nonsuit or give leave to amend, but it is the practice in this country to give the plaintiff judgment for such portion only as he may prove himself entitled to.

D. C., Galle, 11,303. *Juanis* v. *Simon* 104

Nonsuit.

Nonsuit on account of plaintiff's absence—Subsequent action for same cause—Maxim, Interest reipublicæ ut finis sit litium.

The facts that the plaintiff has twice already brought an identical action, and been twice absent on the day of trial, and his suit accordingly twice dismissed, do not afford sufficient ground for a third dismissal when plaintiff is ready and willing to go to trial.

The maxim *Interest reipublicæ ut finis sit litium* commented upon.

C. R., Bentotte, 1,671. *Mendis* v. *Himmappooa* ... 88

See EXAGGERATION OF CLAIM.
INTERVENTION, 3.
POSTPONEMENT, 2.

Offices, purchasing of.

See CONTRACT, 1.

Onus probandi.

See CROWN LAND, 2.
HINDOO TEMPLE.
PADDY, 2.
PRACTICE, 8.

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Ordinances.

No. 9 of 1822, [repealed.]
See Evidence, 5.

No. 8 of 1834, [repealed.]
See Mortgage, 2.
Possession, 1,
Prescription, 1.

No. 8 of 1834, sects. 5, 6, [repealed.]
See Costs, 2.
Principal and Surety, 2.

No. 8 of 1834, sects. 6, 7, [repealed.]
See Prescription, 4.

No. 5 of 1835, [repealed.]
See Succession.

No. 6 of 1835, [repealed.]
See Insolvency, 2.

No. 6 of 1835, sect. 41, [repealed.]
See Insolvency, 1.

No. 5 of 1837, [repealed.]
See Plaint.

No. 2 of 1840, [disallowed.]
See Mortmain Laws.

No. 7. of 1840, sect. 21.
See Principal and Agent, 3.

No. 12 of 1840.
See Crown Land, 1.

No. 12 of 1840, sect. 1.
See Crown Land, 2.

No. 12 of 1840, sect. 6.
See Crown Land, 3.

No. 14 of 1840, sect. 14.
See Paddy, 2.

No. 14 of 1840, sect 20.
See Paddy, 1.

No. 4 of 1841, sect. 3.
See Maintenance.
Vagrant.

No. 5 of 1841, sect. 7, [repealed]
See Master and Servant.

No. 1 of 1842.
See Fiscal, 1.

No. 10 of 1843, sect. 5, [repealed.]
See Court of Requests.

No. 11 of 1843, sect. 12, [repealed.]
See Vexatious Prosecution.

No. 11 of 1843, sect. 14, [repealed.]
See Recognizance.

No. 12 of 1843, [repealed.]
See Contempt of Court, 3.

No. 12 of 1843, sect. 14, [repealed.]
See Examination of Parties, 3, 4.

No. 14 of 1843.
See Queen's Advocate.

No. 15 of 1843, [repealed.]
See Recognizance.

No. 15 of 1843, sect. 11, [repealed.]
See Murder.

No. 15 of 1843, sect. 18, [repealed.]
See False Accusation.

No. 15 of 1843, sect. 23, [repealed.]
See Evidence, 6.

No. 10 of 1844, sects. 32, 37.
See Arrack, 3.

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Ordinances.

No. 10 of 1844, sect. 40.
See Arrack, 2.

No. 10 of 1844, sects. 34, 59, 61.
See Arrack, 1.

No. 11 of 1844, sect. 7, [repealed.]
See Recognizance.

No. 17 of 1844, sect. 25, [repealed.]
See Pawn.

No. 21 of 1844.
See Ejectment, 1.

No. 21 of 1844, sects. 7, 19, [repealed.]
See Partition, 1, 2, 3.

No. 9 of 1845, sect. 11, [repealed.]
See Tolls, 2.

No. 3 of 1846, sect. 7.
See Evidence, 3.
Examination of parties, 1.

No. 5 of 1846, sect. 6, [repealed.]
See Police Court.

No. 6 of 1846, sect. 3.
See Malicious Injury, 2.

No. 6 of 1846, sect. 17.
See Malicious Injury, 1.

No. 3 of 1848, sect. 6, [repealed.]
See Carrier.

No. 12 of 1848, sect. 5.
See Proctor, 1.

No. 19 of 1852, [repealed.]
See Stamp, 2.

Paddy.

1.—*Paddy—Ordinance No.* 14 *of* 1840, *sect.* 20—*Limitation.*

The 20th clause of Ordinance No. 14 of 1840 applies only to prosecutions under the Ordinance and not to a civil action.

C. R., Batticaloe, 5,223. *Armogam* v. *Attiar* ... 60

2.—*Paddy—Ordinance No.* 14 *of* 1840, *sect.* 14—*Notice of cutting—Burden of proving absence of.*

Defendant was charged with cutting and thrashing a chena without notice to the renter, in breach of sect. 14, Ordinance No. 14 of 1840. After evidence for the prosecution, the court below dismissed the case, holding it not incumbent on defendant to prove notice, until the complainant had given "something like proof of cutting without notice."

Held, that all the complainant had to prove under the plea of not guilty was the cutting and thrashing by defendant, and that it was for the defendant to prove compliance with the ordinance by giving notice, the general rule of evidence being, that the *onus* lies on the person who has to support his case by proof of a fact which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant.

P. C., Ratnapoora, 316. *Balehamy* v. *Sinho Appu* ... 75

Paraveni tenant.

See SERVICE TENURES.

Parties.

See ABATEMENT.
EXECUTOR, 3.
NON-JOINDER.
PARTITION, 1.
PRACTICE, 1.

Partition.

1.—*Partition suit—Ordinance No.* 21 *of* 1844—*Omission in application of names of parties entitled—Fraud.*

The mere omission of the name of one party entitled to land which is the subject of an application for partition will not render the proceedings invalid or justify the cancellation of an order of sale made therein; but if it be shown that the party applying had *malâ fide* suppressed the name of a share-holder well known to him in order to deceive the court; or that the party applying is himself no owner, this would justify such cancellation. The application being fraudulent, the whole proceeding would be void and not merely voidable.

D. C., Galle, 75. *Silva* v. *Silva* 145

2.—*Partition suit—Disputed title—Ordinance No.* 21 *of* 1844, *sects.* 7, 19 [*Ordinance No.* 10 *of* 1863]—*Separate action to establish title—Partition off of one co-owner's share.*

Under the Ordinance No. 21 of 1844, a party applying for partition was not entitled to have his own share partitioned off, without partitioning the whole land among all the parties entitled.

The 10th, 11th, and 12th sections making no provision for the case of disputed ownership and not contemplating that event, the parties must first settle their respective rights by separate action, the proceedings in the partition suit standing over in the mean time.

D. C., Galle, 134. *Don Janis* v. *Jando* 140

3.—*Partition suit—Ascertainment of shares—Summary proceedings—Ordinance No.* 21 *of* 1844—*Crown not bound by Ordinance.*

The proceedings for the partition of lands under the Ordinance No. 21 of 1844 are intended to be summary, and it is irregular to require the parties to proceed as in ordinary civil actions.

The shares of the respective parties must be ascertained by the court and not left to the commissioner, who has only to allot shares in proportion to the previously ascertained rights of the parties.

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The Queen may avail herself of the provisions of an Act of Parliament or an Ordinance, though she is not bound by such as do not expressly mention her.

Observations on the construction of the provisions relating to the partition and sale of lands.

D. C., Galle, 152. *Buller* v. *Koelman* 141

Partners.

See PRINCIPAL AND AGENT, 2.

Party.

1.—*Party to suit, death of—Making heirs defendants—Practice —Revivor, bill of.*

The practice of the Supreme Court has been, upon the death of a party to a suit, to allow his heir or legal representative to be substituted in his place by an order of court, upon application made to it for that purpose either by motion or by petition, without any bill of revivor being filed.

D. C., Colombo, 783. *Philip* v. *Bastian* 81

2.—*Party to suit, death of—Reviving suit against legal representative—Executrix de son tort.*

It is not necessary to revive a suit against the heir or legal representative of a deceased party, nor that a bill of revivor, or petition setting forth the facts, should be filed; but the application may be by motion. There must, however, be evidence, apart from the mere statement of the proctor moving, that the party is dead, and that the person cited is the widow and has done acts which (in the court's opinion) make her an executrix *de son tort.*

D. C., Kaltura, 12,925. *Rodrigo* v. *Dombalahamy* ... 88

Patent ambiguity.

See INTEREST, 1.

Pauper.

1.—*Pauper, appeal by—Practice.*

A petition of appeal *in formâ pauperis* cannot be received unless the appellant has previously obtained leave from the district court on petition so to appeal, which should be reported on (as regards good cause of appeal) by some other proctor than appeared for appellant at trial.

D. C., Colombo, 14,838. *Tieris* v. *Pamel* 38

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2.—*Appeal by pauper—Report of proctor other than pauper's—Practice.*

The Supreme Court will not receive the appeal of a pauper unless a proctor, other than the pauper's proctor, have certified to his having good ground of appeal.

D. C., Tangalle, 1,508. *Nanhamy* v. *Dinekehamy* ... 118

3.—*Pauper suit—Proctor reporting, afterwards retained for plaintiff—Practice.*

A proctor selected to report on a pauper's cause of action should always be independent of the suit, and where he is afterwards retained to conduct the pauper's suit, the court should on the motion of the opposite party appoint another proctor to report on the said cause of action.

D. C., Trincomalee, 7,725. *Rawooter* v. *Nethersahib* ... 53

4.—*Formâ pauperis, application to sue in—Reference to proctor in rotation—Proctor not engaged in the suit—R. & O.* 1833, *sect.* i, *r.* 43.

Where an application to sue *in formâ pauperis* is referred to a proctor under the 43rd rule of sect. 1 of the General Rules and Orders of 1st October 1833, a proctor should be selected who is not engaged in the case, nor interested in the success of either party.

D. C., Negombo, 10,256. *Peris* v. *Fernando* ... 20

See PROCTOR, 7.

Pawn.

Pawn, or pledge—Security for purchase money—Ordinance No. 17 *of* 1844, *sect.* 25 [*Ordinance No.* 16 *of* 1865, *sec.* 66, *repealed by Ordinance No.* 8 *of* 1871, *sec.* 8.]

Plaintiff bought goods of defendant, and for security for the payment of the purchase money deposited certain jewels and gold. Plaintiff having paid the money now sought to recover the jewels. It appearing from plaintiff's examination as party that he had not informed the police of the transaction in terms of sect. 25 of Ordinance No. 17 of 1844, the court below refused to hear evidence and nonsuited plaintiff.

Held, that the transaction was not a "pawn" within the meaning of the section, and plaintiff was not debarred from recovering.

C. R., Galle, 2,194. *Sammin* v. *Meera Cany* ... 150

Petition of appeal.

1.—*Petition of appeal—Qualified signature of proctor.*

Where a proctor appended to his signature on the appeal petition the words "drawn by me on the statement of the appellant,"

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The Supreme Court sent the case back for a new petition at the proctor's own cost, declaring that if a proctor could not conscientiously sign the petition, he should advise his client to have his petition taken down by the secretary.

D. C., Ratnapoora, 5,311. *Appu Naide* v. *Audoo Lebbe* 85

2.—*Petition of appeal—One proctor for two adverse parties.*

It is the duty of every proctor engaged to draw a petition of appeal to peruse the proceedings carefully and not contradict them in his petition.

Where plaintiff's and intervenient's claims are adverse, it is disreputable that the plaintiff's proctor should draw the intervenient's petition of appeal.

D. C., Colombo, 4,408. *Punchyhami* v. *Kattady Rale*.. 103

3.—*Time for filing petition of appeal—Date of delivering judgment—English reckoning.*

The judgment of a district court must bear date the day of its delivery, and the petition of appeal must be lodged within twenty days of it, excluding the days of delivering the judgment and of filing the petition: the rules adopting the English method of reckoning.

D. C., Galle, 14,332. *Dias* v. *Dias* 152

See STAMP, 2, 3.

Plaint.

Plaint—Statement of section of Ordinance contravened—Smuggling—Ordinance No. 5 *of* 1837 [*Ordinance No.* 18 *of* 1852.]

Where a prosecution is founded on a clause of an Ordinance, the charge should follow all the material words of the clause, which should also be distinctly specified.

P. C., Galle, 14,943. *Gun* v. *Sinho Baba* ... 122

Pleading.

See DEFAMATION, 1.
EJECTMENT, 1, 2.
EVIDENCE, 3.
FRAUD, 1.
PARTITION, 1.
PLAINT.

Police Court.

Police Court, jurisdiction to abate nuisance—Ordinance No. 5 *of* 1846, *sect.* 6 [*Ordinance No.* 11 *of* 1868, *sect.* 98.]

The police court has no jurisdiction to order the removal of the branches of a neighbour's tree which overhang the complainant's house. The 6th section of Ordinance No. 5 of 1846 applies only to common or public nuisances, or when the offence is made punishable criminally.

P. C., Galle, 13,946. *Oedoema Lebbe* v. *Tamby Saiboe*... 121

See False imprisonment.

Possession.

1.—*Possession, adverse prescriptive—Ordinance No.* 8 *of* 1834.

Though there are English decisions to the effect that the possession of a joint tenant, co-parcener, or tenant in common is not adverse to his co-holders, yet Ordinance No. 8 of 1834 has defined what it considers adverse possession, under which fall the above joint interests.

D. C., Colombo, 6,587. *Daniel Appu* v. *Sultan Marikar* 9

See Mortgage, 1, 2.

Possessory action.

1.—*Possessory action.*

Observation on the nature of the Dutch law remedy of a possessory action.

D. C., Manaar, 4,637. *Sleyma Lebbe* v. *Lebbe Tamby*... 106

2.—*Trespass to land—Possessory action—Title.*

Where the libel alleged £60 damages accrued to plaintiff from defendant's ouster of him, and prayed not for restoration to possession, but for such other relief as to the court should seem meet,

Held that this not a mere possessory action, but an action of trespass, to which the defendant may plead his title.

Observations on the nature of possessory actions, and on the law applicable thereto.

D. C., Ratnapoora, 6,504. *Kiry Menika* v. *Kiry Menika* 62

Postponement.

1.—*Postponement—Proctor, illness of.*

Illness of a party's proctor is in the district court of Colombo a good ground for postponement. Where the district judge refused to postpone, on the ground that "there were proctors present on

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both sides," but the 2nd defendant's proctor swore he was not prepared to conduct 1st defendant's case (the most important);

The Supreme Court sent the case back for a new trial.

D. C., Ratnapoora, 6,241. *Appu Hamy* v. *Mudelehamy* 36

2.—*Postponement—Absence of material witness—Striking off case—Nonsuit.*

Where a postponement is applied for on affidavit of the absence of a material witness, it should be allowed, unless the court see reason to call for a fuller affidavit. If a plaintiff, when required by the court to proceed, refuses to do so, he may be rightly nonsuited.

D. C., Colombo, 3,282. *Aserappa* v. *Rodrigue* ... 103

3.—*Absence of party at trial—Postponement—Illness of proctor.*

A party employing a proctor need not attend at the trial. If the proctor's absence be owing to illness (to the knowledge of the court) it is good ground for postponement on paying costs of the day.

D. C., Ratnapoora, 3,582. *Cornelis Soyza* v. *Jeronis Silva* 16

See APPEAL, 1.
EVIDENCE, 6.
PROCTOR, 2.
STAMP, 5.
WITNESS, 1.

Practice.

1.—*Practice—Misjoinder in Court of Requests of plaintiff having no interest.*

Even in a court of requests a defendant may take and prove the plea that persons have been joined as plaintiffs who have no interest in the subject of suit.

C. R., Colombo, 6,988. *Thomson* v. *Lambe Ratnals & Co.* 147

2.—*Practice—Appearance of defendant in suit before summons served.*

A defendant is always entitled to appear to the action before receipt of summons, and to get rid of the suit as soon as possible.

D. C., Colombo, 12,977. *Brair* v. *Prins* 112

3.—*Practice—Replication, necessity for—Objection to its absence taken in appeal.*

Where appellant's counsel took the preliminary objection that parties had gone to trial without a replication,

Held, that the objection came too late, and plaintiff was allow-

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ed to file replication *nunc pro tunc* to the amended answer, and, the defence not being made out by the evidence led, judgment was entered for plaintiff as prayed.

D. C., Colombo, 10,442. *Fernando* v. *Fernando* ... 81

4.—*Practice—Time to file answer, extension of—Consent of plaintiff—R. & O., 5th July* 1842, *rule* 4.

Under the 4th rule of the R. & O. of 5th July 1842 the consent of the opposite party is not necessary before a party can obtain further time to plead. In practice one or two extensions should be granted on cause shown, or on affidavit of merits. If further extensions are applied for, the court may order notice to the opposite party.

D. C., Jaffna, 1,227. *Valayuder* v. *Cadergamer* ... 89

5.—*Practice—Rule nisi—R. & O. of* 1833, *sect.* i, *r.* 33—*Making rule absolute.*

If rule 33 of sect. i of the R. & O. of 1833 is acted upon, a rule should in no case he made absolute on the returnable day, but the party respondent should have the additional four days' time whether he appears and moves for it or not, and rule should be made absolute on or after the fourth day.

D. C., Kandy, 20,757. *Supermanien* v. *Telenis Appu*... 110

6.—*Practice—Rule nisi—Time to show cause—Motion to make absolute.*

Where a party has to show cause against a rule *nisi* on a particular day, he should have the whole day for the purpose, so that the rule cannot be made absolute till the next day, and then only on motion to make it absolute.

D. C., Kandy, 20,757. *Supermanien* v. *Theodoris Appu* 107

7.—*Practice—R. & O.* 17*th June* 1844, *r.* 7, *and* 6*th December* 1845—*Withdrawing case from trial roll—Cause shown.*

On the day of trial, plaintiff (who had set the cause down for hearing, but not given notice of trial) moved to withdraw it from the trial roll, but showed no cause, as required by R. &. O. of 6th December 1845.

Held, that he had been rightly nonsuited, under R. & O. 17th June 1844, r. 7.

D. C., Galle, 13,927. *Noncho Hamy* v. *Aberan* ... 153

8.—*Practice—Closing case—*Onus probandi.

The court should call upon plaintiff to state that he has closed his case, and should make a minute of the statement.

Where defendants claimed the whole of a land through their

father who inherited from Miguel, and alleged that their father's "sisters (to whom plaintiffs are admitted heirs) had their portions from other lands, and so we have always possessed,"

Held, that the *onus* was on defendants to prove this arrangement and their father's adverse possession.

D. C., Colombo, 2,098. *Silva* v. *Alwis* 34

9.—*Practice—Interlocutory judgment—Plaintiff waiving defendants who have pleaded—Right of Court to demand further evidence—R. & O. 17th June* 1844, r. 4.

Plaintiff sued seven defendants in ejectment and obtained interlocutory judgment by default against all but the 2nd and 7th defendants, who pleaded. At the trial, after examination of parties, the plaintiff moved for final judgment against the defendants in default, waiving the 2nd and 7th. The court absolved the 2nd and 7th defendants from the instance, and called for evidence as against the others.

Held, that the court below had no right to sever plaintiff's motion, which should have been dealt with as a whole.

Held also, that plaintiff was not entitled to have his motion allowed, it being an evasion of rule 4 of R. & O, 17th June 1844, and calculated to deprive the defendants in default of their right to have final judgment given against them only after a due investigation into the merits at a trial of the case.

D. C., Colombo, 13,407. *Asserappa* v. *Perera* ... 176

10.—*Practice—Judgment, revival of—Sequestration, motion to dissolve*—Legitima persona standi in judicio.

A judgment that is superannuated must be revived whether or not execution has been taken out under it in the interval.

A person [claiming under a deceased defendant whose property is under sequestration] cannot move for the dissolution of the sequestration without having himself substituted in the room of the late defendant, as he has otherwise no *legitima persona standi in judicio.*

D. C., Kandy 17,313 133

11.—*Practice—Superannuated judgment—Issue of execution—Sequestration, continuance of—Superannuation of writ.*

Defendant, as holder of a money judgment, issued his writ and seized certain land of his judgment debtor's in July 1844. The same land was in December 1844 seized by plaintiff on a mortgage judgment. The land was in April 1845 privately conveyed to plaintiff. In 1848 defendant sought to sell the land in execution of his judgment, when it was claimed by plaintiff under his convey-

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ance and the sale stayed. Plaintiff brought the present action to have the seizure dissolved.

There was a levy made on defendant's writ on 4th October 1845, after which it was extended and reissued; on 24th March 1846 the fiscal reported opposition to a proposed sale in execution of the writ. On 21st November 1846 there was a further levy, and the writ was reissued "for service," and again reissued on 4th February 1847. The present opposition was reported on 28th October 1848.

Held, that upon a *casus omissus* arising in the rules of procedure recourse must be had to the Roman Dutch law to which they were assimilated.

The rules containing no provision in this behalf, the Roman Dutch law rule that letters of execution prescribe if not executed within a year of their issue must be applied.

Held, that in the above state of the facts defendant's writ had not been prescribed; that his seizure still remained on the land; that he was entitled to sell the land in execution of his writ; and the court should proceed to determine claims of preference and concurrence to the proceeds realized.

D. C., Batticaloa, 10,936. *Slema Lebbe* v. *Poker* ... 169

See ADMINISTRATION, 7.
CONTEMPT OF COURT, 3.
NONSUIT.
PARTY, 1, 2.
PAUPER.
PROCTOR.
SECURITY IN APPEAL.

Preference and concurrence.

See EXECUTION, 2.

Prescription.

1.—*Prescription—Ordinance No.* 8 *of* 1834—*Adverse possession.*

Plaintiff mortgaged the house in question to G. in 1826 (M. his father-in-law being his surety) and left Colombo in 1830. In 1831 M. paid the mortgage debt and took possession of the house and title deeds, and in May 1834 after edictile citation obtained certificate of quiet possession, he stating that he had then been in the exclusive and uninterrupted possession of the house, as his purchased property, for about 6 years. M. died in 1839 appointing as his executrix his wife Mrs. M., of whose will defendant is the executor.

When the house was seized in 1839 by fiscal under writ against plaintiff, Mrs. M. claimed it as deceased M.'s property by "*certificate* of Provincial Court of Colombo and long possession." But when

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she applied in 1840 for injunction to stay the sale she swore it belonged to M. "as the defendant verily believeth by *purchase*."

The plaintiff returned to Colombo in 1850 the date of the present action. He swore that on leaving Colombo he had left his wife and children in M.'s charge, who (by a verbal arrangement) was to redeem the mortgage, receive rents, and pay balances to plaintiff's wife, that he was on bad terms with M. when he left. R. was the only witness to the verbal arrangement, and he was also a son-in-law of M. and surety *in solidum* with M. on the mortgage to G.; and his evidence was otherwise open to suspicion.

Held (by OLIPHANT, C. J., and STARK, J.) affirming the decree of the district court, that defendant had made out a title by prescription;

Dissentiente CARR, J., who thought there was a total want of *bona fides* on M.'s part, and acts of M. and his wife had been disclosed from which the "acknowledgment of a right existing in another person might fairly and naturally be inferred," which by the Ordinance precluded prescription.

D. C., Colombo, 12,503. *Koster* v. *Drieberg* ... 38

2.—*Prescription—Disability—Begun against predecessors during heirs' disability.*

Prescription once begun runs notwithstanding subsequent disability, so that on death of a person, in whose life it began to run, the heir must enter within the residue of the term although he laboured under disability at his ancestor's death.

D. C., Kandy, 23,466. *Muttu* v. *Menika*... ... 53

3.—*Prescription—Disturbance of possession—Unsuccessful action.*

Where the possession under which a party claims has been ineffectively contested by an unsuccessful action, prescription is interrupted. The mere commencement of an action is sufficient for this purpose.

D. C., Kurunegala, 12,911. *Medankara Unanse* v. *Hahgomua Unanse* 54

4.—*Prescription—Acknowledgment or admission—Ordinance No. 8 of* 1834, *sects.* 6 *and* 7 [*Ordinance No.* 22 *of* 1871, *sect.* 9.]

In an action against an administratrix for goods sold and delivered more than three years before to her intestate, she demurred on the ground that the action was prescribed, and plaintiff only proved a part payment by the intestate thirteen months after the debt accrued.

Held, that the action was prescribed.

D. C., Jaffna, 2,672. *Toussaint* v. *Vander Gucht* ... 139

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5.—*Prescription—Former suit—Interruption.*

A former suit having been filed in time is of no avail to the plaintiff in the present suit, which is a fresh action, and not a revival or continuance of the old one, and the defendant also having made no admission in the former suit of plaintiff's right, the present plea of prescription was upheld.

D. C., Kalutara, 13,080. *Marikar Lebbe* v. *Slema Lebbe* 62

See COSTS, 2, 4.
EJECTMENT, 1.
HIGHWAY.
MORTGAGE, 2.
PADDY, 1.
PRINCIPAL AND SURETY, 2.

Principal and Agent.

1.—*Agent's authority to sue*—Lis pendens.

In an action by C. (as agent and attorney of A. who traded in Ceylon as "P. & Co.") against defendant to recover the value of two bills sold by that firm to defendant, defendant pleaded in abatement pendency of an action for the same claim by Lambe as factor of P. & Co. The district court held that Lambe was personally liable on contracts entered into in the course of his business, his principal being undisclosed, and that Lambe could also sued upon such contracts; and that therefore the plea in abatement was good and defendant must be absolved.

In appeal by plaintiff on the grounds (1) that the court had rejected evidence to show the true position of Lambe towards P. & Co., and (2) that a broker could not sue in his own name.

Held, that plaintiff should have intervened in the former suit, when the relative rights of parties might have been settled without harassing defendant with a second action.

Held also, that Lambe could not be considered as a factor or as having authority to sue in his own name.

Ordered, that the two actions be consolidated, and plaintiff should pay costs of the former action.

D. C., Colombo, 38,134. *Collier* v. *Teagappa Chetty* ... 27

2.—*Agent—Suing in own name—Partners not joined.*

The libel was entitled *Suppramanian Chetty, Agent of Na. Satappa Chetty* v. *Sophia.*

Held, that plaintiff here sued in his own name, and that the words above was matter of description, and surplusage, and that plaintiff could sue in his own name, though he had partners.

D. C., Colombo, 9,145. *Suppramanian* v. *Sophia* ... 36

3.—*Principal and agent—Ordinance No.* 7 *of* 1840, *sect.* 21—"*Lawfully authorized*"—*Writing—Reference to instruments not attached by tape and seal, but alluded to.*

Where a party executes an instrument by his agent "lawfully authorized," the authority to such agent need not be in writing under sect. 21 of the *Ordinance of Frauds and Perjuries.*

The court is very averse from making reference in this country to any document not virtually incorporated with a notarial deed by tape and seal of the notary, although such reference may be allowed by the English law.

D. C., Kandy, 24,146. *Grey & Co.* v. *Arabin* ... 163

See JUDGMENT, 4.

Principal and surety.

1.—*Sureties in appeal—Forfeiture of recognizances—Principal and surety.*

The two appellants became sureties for the accused Janis "calling the sentence of the police court into review, and abiding by the decision of the Supreme Court." The sentence having been affirmed a notice was served upon Janis to appear on 30th May and hear the sentence in review. He did not appear, and the appellants were ordered to produce him on 1st June. On that day their motion for an extension of time was refused and the penalty on their bond declared forfeited.

Held, that Janis not having been called upon to surrender himself, nor been informed that the sentence had been affirmed, he was not obliged; and the sureties' obligation being accessory to his, they also were not liable; and the order refusing reasonable time and declaring the bond forfeited was irregular and must be set aside.

P. C., Galle, 2,254. *Queen* v. *Coroenerogey Janis* ... 73

2.—*Principal and surety—One of two sureties paying off whole debt—Action against principal—Prescription—Ordinance No* 8 *of* 1834, *sect.* 5 [*Ordinance No.* 22 *of* 1871, *sect.* 8.]

Plaintiff, one of two sureties who had not renounced the *beneficium divisionis*, paid the whole debt and now sued the principal to recover the amount so paid.

Held, that he could recover, notwithstanding that he could not have been compelled to pay the whole debt.

Held also, following *Weireman* v. *Jayesondra* (ante p. 17), that

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plaintiff's action was not barred by sect. 5 of Ordinance No. 8 of 1834.

D. C., Galle, 13,525. *Assen Saibo* v. *Ludovici* ... 154

Private person arresting.

See MURDER.

Privileged communication.

See DEFAMATION, 3.

Proclamation.

1.—*Proclamation of* 2*nd March,* 1815—*Martial law—Charter of* 1833.

The defendant was charged with a breach of sect. 3 of the Proclamation of 2nd March 1815, which rendered liable to the penalties of martial law all relatives of the late King of Kandy, that returned to this Island without permission. The defendant was convicted by the district court, which held that the Charter of 1833, abolishing all subordinate courts, had vested exclusive criminal jurisdiction in the district court, which thus could entertain the charge.

Held, setting aside the conviction and sentence, that offenders against sect. 3 should be tried by some proceeding under martial law; that the charter did not and could not abolish courts martial; that no enactment had empowered the district court to administer martial law; and further that the evidence did not support the charge.

D. C., Kandy, 6,321. *Queen* v. *Kistnappa Nayakar* ... 45

2.—*Proclamation of* 23*rd Sept.* 1799.

See SUCCESSION.

3.—*Proclamation of* 18*th Sept.* 1819.

See MORTMAIN LAWS.

Proctor.

1.—*Proctor—Ordinance No.* 12 *of* 1848, *sect.* 5—*Certificate to practise.*

Under sect. 5 of Ordinance No. 12 of 1848 a proctor cannot obtain any taxation of any costs, or maintain any suit to recover costs, for any work done as proctor while without the necessary certificate, and he is liable to be prosecuted by the Q. A. for the prescribed fine.

In the matter of the application of *E. T. Gerlits and Will. Vanden Driesen* 57

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2.—*Proctor who is witness for his client—"Keeping out of hearing"—R. & O.* 1833, *sect.* i, *rule* 27.

The rules of practice are not in the discretion of the district courts to observe or not, but are liable to legal construction; and clause 27 of sect. 1 of the General Rules and Orders of 1st October 1833 ought of necessity to be construed to exempt a proctor in the cause, and medical and scientific witnesses called to give their opinions on the evidence of others, from being "kept out of hearing," such cases being exceptions under the general law of evidence and not abrogated by the rules.

D. C. Colombo, 42,377. *Oorloff* v. *Ebert*... ... 72

3.—*Proctor who is also witness—Remaining in Court.*

If the proctor in the cause is a witness, he will generally be allowed to remain in court, his assistance being necessary for the proper conduct of the cause; but this is matter for the discretion of the judge.

C. R., Badulla, 1,902. *Manikralle* v. *Dingiry Menika* 58

4.—*Proctor and client—Proctor abandoning client's case.*

A proctor is not justified in abandoning the conduct of his client's case after merely giving a general notice that he was leaving the district and calling on persons having claims against him to prefer the same.

D. C., Chilaw, 11,148. *Douwe* v. *Jayewardene* ... 155

5.—*Proctor—Practice—Proctor suing in person in his own Court—Appeal out of time—R. & O.* 1833, *sect.* viii, *r.* 5.

It is a general rule that all proctors, attornies and solicitors are privileged to sue and be sued in their respective courts in person. If a district court finds upon inquiry that the omission to file petition of appeal in time was due neither to the negligence nor delay of the appellant, the matter should be referred to the Supreme Court to decide on the allowance or rejection of the appeal, according to the 5th rule of section viii of the R. & O.

D. C., Kandy, 18,649. *Silva* v. *Coppe Tamby* ... 66

6.—*Proctor—Professional negligence—Damages.*

A proctor is liable in damages to his client who has suffered loss through the proctor's culpable want of care and diligence in ascertaining the real facts of the case, in which he was employed by the plaintiff, and in preparing the pleadings, evidence and appeal.

D. C., Colombo, 34,826. *Candappa* v. *Vaderstraaten*... 26

7.—*Poctor—Report on application to sue* in forma pauperis—*gross negligence.*

Where a court on 2nd September condemned the appellant, a proctor, (who had reported that plaintiff, a pauper, had a good cause of action) in the costs of a suit in which he did not appear, on the ground of gross negligence in recommending the action; and it appeared that the appellant had no opportunity of showing cause nor notice of the order against him till over six months after it was made.

Held, reversing the order of the court below, that appellant was not precluded by not having appealed against the order of 2nd Sep., as he could not be presumed to have had notice of that order ;

Held also, that the gross negligence was not made out.

D. C., Jaffna, 4,517. *Sidavy* v. *Sinny* 16

See ADVOCATE.
PAUPER.
PETITION OF APPEAL, 1, 2.
POSTPONEMENT, 1, 3.
SECURITY IN APPEAL.

Profits.

See INTEREST, 3.

Promissory note.

Promissory note, presentment of—Days of grace—Roman Dutch law.

Under the Roman Dutch law no days of grace are recognised in the negociation of promissory notes.

Randall v. *Haupt* (1 Menzies' Cape Reports, 79) approved *quoad hoc.*

D. C., Colombo, 16,732. *Gerard* v. *Fulton* ... 124

See PROVISIONAL JUDGMENT, 5.

Provisional judgment.

1.—*Provisional judgment—Kandyan Provinces.*

Provisional judgment is matter of substantive law and not of practice. As part of the law of Holland it was introduced into the Maritime Provinces, but it cannot be enforced in the Kandyan Provinces.

D. C., Kandy, 23,468. *Ossena Saibo* v. *Dawoodoo Saibo* 112

2.—*Provisional judgment—Private notice to shew cause against—"Admit or deny signature"—Summons.*

Action on a promissory note, with prayer for namptissement. The usual summons issued, without calling upon defendant to admit

or deny signature. After appearance entered, plaintiff's proctor served private notice on defendant that on a day named he would move for provisional judgment.

Held, that this notice was insufficient to bring defendant before the court for the purpose, inasmuch as, being intended to supply a defect in the original summons, it should have been served in as solemn a way as the summons; and that the notice was also informal for not calling upon defendant to admit or deny his signature.

D. C., Colombo, 2,303. *Dorabjee* v. *Meera Lebbe* ... 75

3.—*Provisional judgment—Account stated—Variance between libel and summons—Alteration of instrument—Stamp—Affidavit in support of answer.*

The libel claimed £259 12*s*, as a sum acknowledged to be due to plaintiff by defendant upon account stated, and called upon defendant to admit or deny signature "to the account hereunto annexed, maked Lr. A., and to show cause why he should not be condemned provisionally to pay to the plaintiff the said sum of £259 12*s*. with legal interest thereon from the institution of this suit till payment in full." The summons required defendant to answer the claim of plaintiff for the sum of £259 12*s*. due upon an account dated 10th August 1842.

Held, that this was not a material variance such as would prejudice defendant, especially as the answer, admitting signature, did not object to the cause of action or the variance, but pleaded that one item in the account was wrongly included therein.

Held also, that a *vitium* (whether blot, tearing of the paper, erasure or interlineation) must be of such a considerable nature as to impress the mind of the judge with a suspicion of the important parts of the document, before *namptissement* would be refused; and that consequently, where the alteration was the correction of an error in the summing up of the credit side of the account, this was not a material error and would not deprive plaintiff of the provisional decree.

Held also, that an account so signed by the defendant is not an obligation and requires no stamp.

Held also, that as evidence by affidavit was inadmissible to procure provisional judgment it should not be allowed in opposition thereto.

D. C., Colombo, 36,701. *Tambapulle* v. *Sanawiere* ... 21

4.—*Provisional judgment—Counter proof by defendant—Time to adduce.*

When, upon a motion for provisional judgment, the defendant

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wishes to adduce counter proof to the plaintiff's, he should be allowed a further day for the purpose.

D. C., Colombo, 3,652. *Umoor Catta* v. *Coonjie Musa* 98

5.—*Provisional judgment—Promissory note—Receipt of only part consideration.*

Where provisional sentence was claimed on a promissory note and it was resisted on the ground of non-receipt of the consideration in full, and it appeared that the wheat, for the price of which the note had been given, had all been delivered to the defendant who had removed only part;

Held (following *Collison & Co.* v. *Ekoteen*, 1 Menzie, 46) that delivery of part of the consideration was sufficient to support the whole note, and that no defence to the prayer for provisional sentence had been shown.

D. C., Kandy, 27,660. *Meeyapulle* v. *Soyza* ... 57

6.—*Provisional judgment—Interlocutory order.*

An appeal from a decree of provisional judgment may be prosecuted without giving security, as from an interlocutory order.

D. C., Colombo, 37,269. *Eduljee* v. *Ismail Lebbe* ... 6

Punishment.

Punishment—Flogging with the rattan.

Flogging with the rattan is not a legal punishment.

D. C., Ratnapoora, 4,654. *Pinna* v. *Kirry Binda* ... 59

See MALICIOUS INJURY, 2.
MASTER AND PUPIL.
THEFT, 2.

Queen's Advocate.

Queen's Advocate, action by—Ordinance No. 14 of 1843—Discretion.

Where, in an ordinary suit by the Q. A. for the recovery of a Crown debt, the defendants (excepting the first) made default, and plaintiff moved for judgment against them, the district judge disallowed the motion, holding that the Q. A. was bound to proceed under the Ordinance No. 14 of 1843, which prescribed seizure of the debtor's property by the Government Agent as the first step in such a proceeding.

Held, that the Ordinance did not take away the Q. A.'s Common

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Law remedy against the debtor, and that proceeding under the Ordinance was discretionary with him.

D. C., Kandy, 16,417. *Buller* v. *Perera* 11

Recognizance.

Recognizance, power of justice to take—Ordinance No. 15 *of* 1843, *sect.* 36 [*Ordinance No.* 11 *of* 1868, *sect.* 188]—*Recognizance to appear when noticed—Forfeiture—Notice to appear, form and service of—Ordinance No.* 11 *of* 1844, *sect.* 7 [*Ordinance No.* 6 *of* 1855, *sect*. 10]—*Review by Supreme Court—Ordinance No.* 11 *of* 1843, *sect.* 14 [*Ordinance No.* 7 *of* 1874 *sect.* 6.]

The Supreme Court has power, under Ordinance No. 11 of 1843, sect. 14, to review the proceedings of a police court in recovering the amount of a forfeited recognizance.

The cognizor was charged with theft on oath before a justice, who, without recording any depositions, took of him and two sureties a recognizance "to appear and answer to any information, indictment, or sufficient complaint which shall be presented against him in any competent court for Midland Circuit upon receiving notice of the time and place of holding such court at Colombo (which place is hereby elected by him for that purpose.)"

Held, that no bail could be required by a justice except as provided for by Ordinance No. 15 of 1843, and that the bond in the present case, having been taken before any examinations had been recovered, was void.

Held however, (*dissentiente* CARR, J.,) that in a proceeding to recover the penalty on the bond a police court could not inquire whether the recognizance had been rightly taken, its duty being only to take proof of the forfeiture thereof

A notice dated 7th August 1851, was on 12th August left at the cognisor's last known place of abode in Colombo, requiring him to appear before the Supreme Court at Colombo "forthwith" on pain of forfeiting his recognizance.

Held, that though the service of this notice was sufficient, it was wholly insufficient in form; that there had therefore been no forfeiture proved; and that the order of the police court requiring the cognizor and his sureties to pay the penalty of the bond into court was irregular and must be set aside.

P. C., Colombo, ——. *The Queen* v. *Price* ... 171

See PRINCIPAL AND SURETY, 1.

Registration of marriage.

See DONATION, 2.

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Rent.

Rent—Use and occupation—House built on another's land—Court of Requests, jurisdiction of.

A person who builds a house on another's land with the owner's permission is not liable to pay rent to a purchaser of the land from the owner, and even if ejected, would be entitled to remove the materials of the house.

C. R., Kurnagalle, 727. *Perera* v. *Singo Naide* ... 114

Replication.

See PRACTICE, 3.

Res judicata.

Res judicata—*Husband and wife—Kandyan Law.*

Where the defendant's father had sued the plaintiff's husband (Selappoo) in a former suit to recover the land now in dispute, and Selappoo relying on his own right apart from his wife had failed and judgment had been entered for the present defendant for the lands;

Held, that the plaintiff (who now relied on her own independent right) was not barred by the previous action, and was entitled to recover, having made out a prescriptive title as against the defendant.

D. C., Kandy, $\frac{2,690}{19,472}$ *Kiri Ettena* v. *Heteregedere Appu* 33

See ABSOLUTION.
DISTRICT COURT, 1.

Revivor, bill of.

See PARTY, 1.

Right of reply.

See EVIDENCE, 8.

Robbery.

See INDICTMENT, 3.

Rule nisi.

See PRACTICE, 5, 6.

Rules and Orders.

1833, sect. i, r. 27.
See Proctor, 2.

1833, sect. i, rr. 29, 31.
See Examination of parties, 1, 3, 4.

1833, sect. i, r. 32.
See Intervention, 2.

1833, sect. i, r. 33.
See Practice, 5, 6.

1833, sect. i, r. 43,
See Pauper, 4.

1833, sect. ii, (Forms.)
See Contempt of court, 4.

1833, sect. iv, r. 7.
See Administration, 4

1833, sect. viii, r. 5.
See Proctor, 5.

5th July, 1842.
See Judgment, 2.

5th July, 1842, r. 1.
See Defamation, 1.

5th July, 1842. r. 4.
See Demurrer, 3.
Practice, 4.

17th June, 1844, r. 4.
See *Ex parte* hearing.
Practice, 9.

17th June, 1844, r. 7.
See Practice, 7.

6th December, 1845 [Ordinance No. 12 of 1852.]
See Indictment, 2.
Practice, 7.

Schedule of Udear.

See FISCAL, 1, 2.

Scienter.

See ANIMAL.

Second action.

See NONSUIT.

Secundum probata.

See EXAGGERATION OF CLAIM.
NON-JOINDER.

Security in appeal.

Security bond in appeal—Authority of proctor to sign—Practice.

Where a proctor's proxy did not authorise him to sign the security bond in appeal on behalf his client,

Held, that it was bad, being so signed.

Semble, from the practice of the House of Lords and Privy

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Council, that a petition of appeal to the Supreme Court should be signed by a proctor of that court.

But it is not practicable so to confine the business of appeals, owing to the state of outstation courts as regards proctors.

D. C., Amblangodde, 4,280. *Carloe* v. *Ossappoowe* ... 8

Security for costs.

See STAY OF PROCEEDINGS, 3.

Seduction.

See DEFLORATION.

Sentence.

See MALICIOUS INJURY, 2.

Separate suit.

See ADMINISTRATION, 2.
PARTITION, 2.
TESTAMENTARY SUIT.

Sequestration.

See CONTEMPT OF COURT, 2.
PRACTICE, 10, 11.

Service tenures.

Service tenures—Peraveni tenants and tenants at will—Alienation—Ejectment.

Where lands are held in paraveni subject to services, the tenants may alienate them, but they still remain subject to the performance of the services. A plaintiff suing in ejectment should aver that the defendants are tenants at will

D. C., Ratnapoora, 5,636. *Basnaike Nilleme* v. *Mudianse* 159

Ship.

Ship, liability to keep in repair—Owner and hirer.

Under the Roman Dutch law, the owner of a ship which he has let to another is bound to keep it in good repair : on his failing to do so, the hirer may execute repairs, deducting their value from the rent agreed upon, or may abandon the property let.

D. C., Jaffna, 3,271. *Ribery* v. *Sanmogum* ... 148

Slander.

See DEFAMATION, 2.

Smuggling.

See PLAINT.

Specialty.

See BOND.

Specific performance.

Specific performance—Agreement for sale of land—Recital and reference to other documents.

In an action for specific performance of an agreement by defendant to convey certain land to plaintiff, the following was proved to be the agreement executed before a notary and witnesses: "Don Cornelis Ameresekere (the plaintiff) having agreed with me by letters bearing date the 9th inst., with respect to the garden Pahale Ambegahawatte, otherwise called Bandarewatte, I have received the sum herein mentioned (£450)."

Held, that the plaintiff had not shown any concluded agreement, and was not entitled to judgment.

D. C., Colombo, 4,821. *Ameresekere* v. *Jayewardene* ... 162

Stamp.

1.—*Stamp—Pleadings of intervenients—Value of land in dispute.*

Where intervenients come into a suit, the value of stamps on their pleadings must be regulated by the value stated in the claim, unless this be disputed as excessive.

D. C., Kandy, 25,719. *Selby* v. *Juanis.* 182

2.—*Stamp—Ordinance No.* 19 *of* 1852 [*Ordinance No.* 23 *of* 1871.]—*Petition of appeal—Stamping after filing.*

The appellate court rejected a petition of appeal because it was not stamped in terms of the Ordinance No. 19 of 1852, and could not afterwards be stamped. The Supreme Court had no power to grant to any party the indulgence of filing a fresh petition after the time prescribed by the Ordinance had elapsed.

C. R., Pt. Pedroe, 1,269. *Alwar* v. *Valiuppen.* ... 51

3.—*Stamp—Petition of appeal against committal for contempt.*

Petitions of appeal in cases of contempt of court are not required to bear any stamp, such proceedings being in the form of those in criminal cases, which need bear no stamp.

Re *Bastian.* 110

4.—*Stamp—Documents to establish contract requiring to be in writing under the Ordinance of Frauds—Guarantee—Consideration* ex facie.

Plaintiff, the holder of a note made by S., who was about to leave the Island, contemplated arresting S. in mesne process, but de-

sisted upon defendant's promising to pay the debt. Plaintiff brought this action to recover the amount of the note, and at the trial tendered certain letters of defendant's in evidence to prove the guarantee. These were objected to as unstamped.

Held, that the guarantee, not showing on the face of it the consideration for which it was given, was not binding on defendant. Further, the letters could not be held sufficient to establish a contract which was not in itself binding on the parties or required a stamp.

D. C., Badulla, 13,871. *Meera Saibo* v. *Falconer.* .. 177

5.—*Stamp on Dowry deed—Postponement to procure stamping.*

Where on production of a deed at the trial it is found insufficiently stamped, the case may be allowed to stand over to get the deed duly stamped, but if the cause come on for hearing again without this being done, the defendant should be absolved from the instance.

D. C., Jaffna, 420. *Candappa* v. *Nagamany* 80

6.—*Stamp—Objection, when to be taken.*

An objection to the stamp must be made before the paper is read in evidence,

C. R., Chavakachcheri, 4,171. *Casinader* v. *Morger* ... 63

See PROVISIONAL JUDGMENT, 3.

Stay of proceedings.

1.—*Stay of proceedings, object of—Identity of subject matter—Vexatiousness.*

Observations on the object, and scope of the remedy of staying proceedings in an action until the payment of costs previously decreed against the plaintiff.

D. C., Galle, 15,108. *Candoe Umma* v. *Saripadien* ... 122

2.—*Stay of proceedings till payment of costs of former action.*

The court should not stay the proceedings in a second action until payment of the costs of a former action for the same subject-matter, unless such second action appears to be vexatious.

D, C., Batticaloa, 11,446. *Cungecandepody* v. *Palen* ... 118

3.—*Staying proceedings until security for costs given—Notice of motion.*

Notice of motion to stay proceedings until plaintiff finds security for costs must be given to the plaintiff.

Where plaintiff resided and had property in the Island (though not in the district in which the case was pending) and it was not alleged that he intended leaving the Island,

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Held, that this was not sufficient reason for calling upon plaintiff to find such security.

D. C., Negombo, 10,943. *Cornalis Appu* v. *Carroll* ... 15

See APPEAL, 1.

Succession.

Succession, laws of, among natives of Batticaloa—Ordinance No. 5 of 1835 [*repealed*] *and proclamation of* 23*rd Sept.*, 1799.

The laws and customs of Tamils of Batticaloa, regarding rights of succession to property, were never interfered with by the Dutch courts, and must still govern cases arising among those natives. The special customs of the *Moquas* and *Wanniahs* have also been recognised by the Supreme Court in session at Jaffna.

D. C., Batticaloa, 8,933. *Chinnetamby* v. *Wennys* ... 13

See INHERITANCE.
KANDYAN LAW, 2, 3, 4, 5.

Summary proceedings.

See CROWN LAND, 1, 2.
PARTITION, 3.

Superannuated judgment.

See PRACTICE, 11.

Superannuated writ.

See PRACTICE, 11.

Surety.

See PRINCIPAL AND SURETY.

Survey.

1.—*Survey, power of court to order—Proceeding where survey is necessary.*

A court has no power to order surveys, or to dismiss a party's case because he cannot pay the expenses of a survey ordered by court. If plaintiff is unprovided with a survey, where one is necessary for the understanding of his case, defendant must be absolved, or plaintiff allowed time to produce one on payment of all costs.

D. C., Negombo, 7,653. *Simon* v. *Batteleapatera* ... 15

2.—*Cancelling private survey—Power of Court to order.*

A court has no power to cancel, obliterate or alter any private

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map or survey by a party of his own land, merely because it is incorrect; though the court may reject it as proof.

D. C., Colombo, 9,247. *Fernando* v. *Rodrigo* 5

See BOUNDARIES.
HIGHWAY.

Tatto-maroo.

Tatto-maroo cultivator—Right to gems found on land—Damages.

Where all the parties entitled to cultivate in tatto-maroo were engaged in searching for gems on the land, one party cannot recover damages from the other for injury to the land unfitting it for cultivation.

Joint proprietors are presumably entitled to share in the value of any gem found on the land.

D. C., Ratnapoora, 6,294. *Naidehamy* v. *Kaluhamy* ... 37

Testamentary suit.

Testamentary suit—Irregular proceedings—Separate action.

An administrator having filed an inventory of the intestate's property as it stood at the time of her death sixteen years before (after which he had himself possessed such property as her husband,) one of the heirs applied that he be ordered to file an inventory of the present property too. To this application the administrator answered, and the applicant replied, and after argument the court decided for the administrator.

Held, that the entire proceeding was irregular and must be set aside.

D. C., Colombo, 216. *Re Atkinson, Vandersmagt* v. *Sansoni* ... 149

Theft.

1.—*Theft—Fair claim of right by the accused.*

Where, upon a charge of theft, there is any fair claim of property or right in the prisoner to the subject of the theft, or if it be brought into doubt at all, the court will acquit the prisoner.

P. C., Negombo, 9,340. *Christiansz* v. *Fernando* ... 126

2.—*Theft—Cattle stealing—Unlawfully receiving stolen cattle—Corporal punishment.*

The practice of the Supreme Court for some years past has been not to inflict corporal punishment where the prisoner is acquitted of the first count for stealing cattle, and convicted only on the second count for receiving,

D. C., Matura, 7,387. *Wellehinde* v. *Don Andris* ... 59

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Thesavalamai.

1.—*Thesavalamai—Batticaloa customary law—Dowry property, alienation of by husband.*

Observations on the similarity existing between the Thesavalamai and the customary law obtaining at Batticaloa.

D. C., Batticaloa, 10,443. 135

2.—*Thesavalamai—Roman Dutch law—Surviving spouse—Usufructuary alienating or encumbering subject of the usufruct.*

Under the Thesavalamai, children cannot claim the profits from the estate of their deceased father until after the mother's death.

By the Roman Dutch law, a usufructuary attempting to alienate the property does not forfeit his usufruct.

D. C., Jaffna, 1,601. *Casinader* v. *Raymond* ... 138

Time.

Time for doing an act under rules of court, calculation of.

Where an act is required by the rules and practice of the courts to be done within a particular number of days, the period shall be reckoned exclusively of the first day and inclusively of the last day; except when such last day falls on a Sunday or public holiday, in which case the time is extended to the following day.

D. C., Colombo, 4,762. *Ahamado Lebbe* v. *Sultan Marikar* 7

See PETITION OF APPEAL, 3.
PRACTICE, 4, 6.

Title.

See CROWN LAND, 1, 2.
HINDOO TEMPLE.
JUDGMENT, 3.
PARTITION, 2.
POSSESSORY ACTION, 2.

Tolls.

1.—*Tolls—When payable—"In respect of" bridges and ferries.*

If a person crosses or passes over any bridge or ferry, he is liable to pay toll "in respect of" it, and cannot evade the toll by stopping at the collector's house on the other side of the river and not passing through the bar placed there.

P. C., Caltura, 13,712. *Perera* v. *Fonseka* ... 61

2.—*Tolls—Ordinance No. 9 of 1845, sect. 2 [Ordinance No. 14 of 1867, sect. 4.]*

Sect. 2 of Ordinance No. 9 of 1845 levies the toll upon the vehicle drawn by a horse, and not upon the horse. If therefore toll have been paid on such a vehicle it may return free, drawn by the same horse. But if the horse return alone, it is liable to pay, no toll

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having previously been exacted for his passage. It follows, that no previous payment of toll for a horse can operate as an exemption from any portion of the toll demandable upon a vehicle drawn by such horse, although the horse itself might pass toll free under sect. 6.

P. C., Colombo, 6,095, *Doe* v. *Voors.* 91

Trespass.

See ASSAULT.
POSSESSORY ACTION, 2.

Ultra vires.

See DISTRICT COURT, 1.

Use and occupation.

See RENT.

Usufruct.

See THESAVALAMAI, 2.

Usufructuary mortgage.

See INTEREST, 3.
MORTGAGE, 1, 2.

Vagrant.

Vagrants Ordinance, No. 4 of 1841, *sect.* 3, *subsect.* 2—*Desertion of wife and children—Continuance of offence.*

Desertion is a continuing offence and must be considered as repeated every day that it continues to exist, and the plaint should lay the offence on a date within a month of filing it, in order to take the case out of sect. 22 of the *Vagrants Ordinance,* 1841.

P. C., Galle, 8,421. *Babahamy* v. *Juan* 110

Variance.

See INNDICTMET, 2.

Vexatious action.

See STAY OF PROCEEDINGS, 1.

Vexatious prosecution.

Vexatious prosecution—Ordinance No. 11 *of* 1848 *sect.* 12 [*Ordinance No.* 11 *of* 1868, *sect.* 106]—*Fine.*

Each of the complainants, who have jointly brought a false, frivolous or vexatious charge, may be fined £1 under sect. 12 of Ordinance No. 11 of 1848.

P. C., Chavakachcheri, 11,323. *Armogam* v. *Sidemberenader* 63

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Will.

1.—*Will—Probate—Proof in solemn and common form—Consent of minors to probate.*

Minors cannot consent to probate in common form, and the court should appoint a guardian and allow a caveat to be entered and the will proved in solemn form, if the court doubts the validity of the instrument, even though consent of parties be seemingly given to probate in common form.

D. C., Matara, 334. *In re Thomas Aratchy* ... 62

2.—*Will, joint or mutual—English and Roman Dutch law.*

A mutual will is unknown to the English law, but is allowed by Dutch law to married persons. Such a will, though on one paper, contains two distinct wills, each of which may be proved separately as such.

D. C., Negombo, 10,866. *Fernando* v. *Fonseka* ... 21

Withdrawing case from trial roll.

See PRACTICE, 7.

Witness.

1.—*Witness, examination of, as to writing—Discretion of court as to recall and postponement.*

" A witness cannot properly be asked on cross-examination whether he had written such a thing; the proper course is to put the writing into his hands, and ask him whether it is his writing."

The district court has full power to call for further evidence at any stage of the trial, and to postpone the trial for the purpose; and to put questions to witnesses for the prosecution to explain objections taken by counsel for the prisoners.

D. C., Matelle, 4,138. *Loku Banda* v. *Sirimalralle* ... 10

2.—*Witness, attesting—Evidence of handwriting.*

The hopeless illness of an attesting witness is not a sufficient ground for admitting evidence of his handwriting. Where a notary is dead, proving his handwriting would not suffice, but an attesting witness would have to be called.

D. C., Colombo, 32,837.—*Don David* v. *Ederemanesingem* 34

See EVIDENCE, 1, 9.
PROCTOR, 2, 3.

Writ of possession.

See CONTEMPT OF COURT, 3.

Writing.

See PRINCIPAL AND AGENT, 3.
STAMP, 4.
WITNESS, 1.

D. C., Colombo, No. 3,569. — *Wedda* v. *Balia.*

"Supreme Court Minutes," 1843.

Jan. 14.

Carr, J.,—Remanded for the case to be heard *de novo.* The defendant has not satisfactorily made out his case, as the facts deposed to by his witnesses are not conclusive. For instance, though the defendant and the deceased respectively addressing each other as "father" and "son" is one of the strongest facts proved, yet such expressions amongst Kandyans of the same caste are not uncommon between any old and young persons living together, or intimately known to each other.

There are no prescribed forms of adoption under the Kandyan law, which are, nevertheless, very strict in requiring clear proof of the adoption being openly declared, and recognized in such a manner as can leave no doubt of the adopting party's intention, that the child adopted should thereby succeed as an *heir* to the estate of the adopting parent. Thus, it has been held, though a child may have been reared in a family, and contracted marriage, and dwelt with his wife in the house of his patron, and cultivated his lands, yet such circumstances alone would not be construed into a regular adoption, unless it could be also shewn that, by agreement with the natural parents of the child on its removal, or by subsequent declarations and acts of the adopting party, a clear intention was manifested by him to adopt the child as his own son, and to make him an heir to his estate.

D. C., Kandy, No. 1,333. — *Mootoo Menika* v. *Tikeri Menika.*

June 24.

Per Curiam, (Oliphant, C. J., Carr, J., and Stark, J.) :—Decree modified by it being decreed that the plaintiffs are entitled to recover one-half of the lands in dispute, and that both parties do pay their own costs in this case.

The late father of the second and third plaintiffs and first defendants having left issue by two marriages, his estate should be divided into two equal portions, and the defendant being the only child by one marriage, is entitled to a moiety of her parent's estate, and would not forfeit such right by her deega marriage in favour of her brothers or sisters of the half blood.

"Supreme Court Minutes," 1843.

There appears to have existed a difference between the *Saffragam* and *Udderatte* customs on this last point, as by the Saffragam customs a deega daughter of the half blood would never forfeit by any deega marriage her right to inherit a share of her father's estate in favour of her brother and sisters of the half blood; whereas the old Udderatte customs made a distinction in such cases as to the rights of the daughter when she had been married in deega by her father, and where she married in deega subsequent to his decease. Yet, this distinction never extended to the mother's estate; and even in respect to the father's estate, it does not, from the cases cited at the bar, appear to have been adhered to or acknowledged latterly by the Kandyan Chiefs, (who have been examined in the Supreme Court as assessors, and as witnesses to the customs), the more liberal custom having generally prevailed, viz:—that the daughters of the half blood do not forfeit, by any deega marriage, their right to inherit their parent's estate in favour of their brothers or sisters of the half blood.

July 12.

D. C., Jaffna, No. 4,011 and 10,939. } *Buller, Q. A.* v. *Racket.*

Per Curiam, (Oliphant, C. J., Carr, J., and Stark, J.):—On the 15th February 1842, the district court made an order in the case No. 4,011 for the payment of the amount of deposit under the writ 2,225, to the estate of Verwyk. Mr. Modder opposed this application, both as proctor for the plaintiffs, and also as Deputy Queen's Advocate. On the 17th February 1842, Mr. Modder, as Deputy Queen's Advocate, made an application in the case No. 10,939, that the amount deposited, being the proceeds sale of 3rd defendant's property, might be paid to the Crown in part satisfaction of the judgment of the 16th February in the Crown's favour, which was refused on the ground that the district court had already made an order on the 15th February for the payment in favour of Verwyk's estate; but this order the Supreme Court has, on this appeal heard on circuit, set aside, because there was another applicant and the claims had not been investigated and the priority ascertained. The case now comes before this court on the appeal by the attorneys of Vander Spaar, (who are the real plaintiffs in both cases,) against the order of the 15th February, and this court is of opinion that a sufficient claim was put in against the

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sum in deposit, because the same was still in *custodia legis*, and not paid over to the creditor, who took out execution. The Dutch law appears conclusive on this subject. Thus in Peter Peckius *on Arrest*, p. 464, § § 2, 3 and 4, it is stated :—

"This matter is treated here at large, and appears merely to have created the distinction between judicial pledge, *id est*, *pignora prætoria*, which is granted without previous proceedings at law, for the securing of a thing in litigation, *de quibus num* 2, from which our common arrest and attachment does not differ much, nor from pledge, *hoc est*, *pignora judicialia*, seized by virtue of execution on judgments; this distinction, however, does not determine the case by our daily practice, because it is a general rule amongst us that arrest gives no preference without any distinction, even in *pignora judicialia,* and arrest in execution, which gives to no one a right, as long as the effectual execution does not follow it, that is to say, as the executed property or the proceeds produced therefrom, have not been actually delivered over to the hands of the creditor; because as long as there is something remaining, it is understood that preference and concurrence take place, and that every one may always for that purpose interpose his claim, as the execution being made for every one, each retains his right. For which purpose also the publications of sale by execution are made in order that every one may prefer his claim if he has any. See *Instructions of the Court,* art. 176 and 177. This had been adjudged in revision by the Supreme Court on the 27th Feb. 1652, on a certain petition presented by Aelbrecht Erasmus Heeman against the superintendent of the dams and dykes of the great dykes of Aelsmeer, plaintiff, in arrest in execution on the moveable goods of Gerrit Tresveld, sheriff of Aelsmeer, against the delivery of the proceeds of the goods sold, and the prayer for injunction granted against the payment of the proceeds in execution: in which case it has been distinctly adjudged that as the plaintiff has not opposed the sale or execution, which he approved as being well and rightly done, but only prosecuted his right to the proceeds produced of the goods sold, he was admissible, as long as the same were not paid over. For which purpose, in some towns, are particular statutes that the sheriffs are bound not to pay over to the triumphant, the proceeds sale in execution which they receive, but to bring the same into the court to be distributed there after inquiring into the matter. See Statutes of Leyden art. 197 in fine. *Eo etiam spectare videtur decisio* Anton. Fabri ad tit. Cod. *de execut. rei jud.* lib. 7. tit. 20, defin. 5, *ubi refert quod judicati actio non habeat privilegium taciti pignoris; atque ideo non aliter condem-*

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nati bona pignori capi possint quam si condemnato intra statutum tempus non satisfacienti, hoc ipsum judex statuat."

The court further refers on this point to the following passage from Peter Vroman's Treatise *de Foro Competenti*, B. 1, c. 3, pp. 122 and 123 :—

" At Utrecht, attachment by execution gives right of preference. Vide *Consultation of Utrecht* : vol. ii. cons. 134. But with us this has not been adopted in practice. According to the common rule, arrest gives no priority or preference. Therefore with us, in regard to preference, there is no distinction made between arrests which are granted without previous proceedings at law for securing a litigious cause, and arrests in execution ; because even in regard to the last, he that obtains execution first does not amongst us acquire any right over all others, as long as the property seized, or the proceeds produced therefrom, has not in fact been delivered over to him, up to which time every one is at liberty to interpose his claim, because until such time, it is considered that preference and concurrence have place, and that the execution was made on behalf of all and every of the creditors, saving to each, however, his right ; as has been adjudged on the 27th February 1862 by the Supreme Court in revision, on the petition presented by Augustus Erasmus Heerman against the inspectors of the dams and dykes of the great Dam of Aelsmeer, plaintiff in arrest in execution, and the prayer for injunction against the payment of the proceeds in execution granted."

The order of the 15th day of February 1842 must therefore be set aside, and the amount deposited be paid to all claimants according to their legal priorities. Each party to bear their own costs, excepting such costs as may have been caused by the new libel not having been filed in time, which must be borne by plaintiffs.

July 12. D. C., Colombo, No. 8,931. } *Silva* v. *Juan*.

Per Curiam :—The Supreme Court have not been able to find that the district courts have any authority, by the Dutch law, to award triple costs.

D. C., Colombo, No. 9,371. } *Fernando* v. *Coulthard.*

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Augt. 24.

Carr, J.,—Set aside and plaintiff's claim for damages dismissed but both parties are to pay their own costs in this suit.

The defendant was clearly justified in seizing the plaintiff and detaining him in custody until the crowd had dispersed, but as the plaintiff is not proved to have been guilty of any violence, nor charged with any serious offence, nor appear even to be known to the defendant, this court considers that the defendant ought not to have left the plaintiff locked up in the stocks to pass the whole night there in the open air, though the plaintiff, having obstinately refused to come out, when desired, is not entitled to any claim for damages.

If the defendant had adduced only evidence that he had revisited the stocks on the same night after the crowd had dispersed, in order to release the plaintiff and had then found that the plaintiff had broken the stocks and forcibly released himself, or that defendant not having done so was owing to his having received information on that night of the plaintiff's escape, this court would have adjudged to the defendant his full costs in this action.

D. C., Colombo, No. 9,247. } *Fernando* v. *Rodrigo.*

Augt. 31.

Carr, J.,—Affirmed, except as to the order therein for defendant's survey to be cancelled, which is set aside.

A court has no power to cancel, obliterate or alter any private map or survey which a party may have had made of his land, merely on account of the respective boundaries of the portions which he holds separately and in common, not being correctly defined thereon; though the court can reject any such survey in proof, or record its opinion upon the general evidence, shewing its incorrectness.

D. C., Colombo, No. 35,663. } *Sultan Saibo* v. *Sinne Pulle.*

Nov. 23.

Oliphant, C. J.,—On the 20th day of January 1843 judgment was given by default in plaintiff's favour, and appeal was entered in due time; but on the 25th, a motion was made under the 38th rule of court, on behalf of the defendant, that the

"Supreme Court Minutes," 1843.

judgment should be set aside, and the defendant be allowed to put in his answer. The district court, on the 1st July 1843, refused the application on the ground that it had no power to set aside its own final judgment.

If it were necessary to the Supreme Court in this case to decide this point, it would reserve it for the consideration of the judges collectively. But the Supreme Court considers that the application was rightly rejected, as the defendant in this case was not in a condition to take the benefit of the rule, inasmuch as he never could show that he was prevented from appearing in due time by accident or misfortune, or by not having received information of the proceedings, inasmuch as he did appear and was represented by his proctor during the whole proceedings. There is nothing, so far as appears, to have prevented him, before his departure for the coast, to have furnished his proctor with full instructions, not only for answer, but for the conduct of the case until its determination; and he might have communicated with him in the course of a few days even whilst absent, and obtained time to take any particular step if required. If it was necessary to proceed to the coast to obtain information to defend the suit, the defendant should before his departure have applied to the court for the time on the above mentioned ground. But he leaves the island, and he leaves also his case to his proctor, without instructing him how to proceed in the very next stage of the case. Can he complain if the plaintiff, who instituted the suit in March 1842, presses for and obtains judgment in January 1843? He has no equity that this court can discover, to induce it to reverse the order of the district court of the 1st day of July 1843, which is therefore affirmed with costs.

D. C., Colombo, No. 8,563. } *Silva* v. *Perera*.

OLIPHANT, C. J.,—An intervenient, who intervenes to justify the title of the defendant, cannot be non-suited.

"Supreme Court Minutes," 1844.

Feb. 14.

D. C., Colombo, No. 37,269. } *Eduljee* v. *Ismail Lebbe*.

CARR, J.,—The appeal in this case should be allowed without security, under the exception in favor of interlocutory orders contained in the 3rd clause of section vii. of the rules of court.

The question appears settled by the Dutch law authorities quoted, that provisional sentences and decrees not being definitive, though they have sometimes the force of definitive sentences, are still typically (*oneigentlyk*) comprehended under, or come within, the denomination of interlocutary sentences; and the court does not consider itself justified in putting a limited construction on the general exception in favor of all interlocutory orders in the above rule, so as to exclude any sentences that are of an interlocutory class or nature. As an instance that the court has hitherto considered the terms "interlocutory orders" and "interlocutory decrees" as often used synonymously, being both comprehended under the general Latin term of *sententia interlocutoria,* and the Dutch word "*interloqueeren,*" the court may here refer to the practice on judgments over-ruling pleas or demurrers, and condemning the defendant to answer, which are called "interlocutory decrees." (Van Leeuwen p. 628). They affect the principal question, and have the force of a definitive sentence on the point of defence raised in the plea of demurrer. Yet appeals from such interlocutory orders or sentences have always been allowed without security. "Supreme Court Minutes," 1844.

On behalf of the respondent, the court has had strongly pressed upon its consideration that execution may issue under a provisional sentence of namptissement, wherein it materially differs from an interlocutory order which ought to be enforced by attachment for contempt; but the court views the process to enforce the sentence of namptissement as only interlocutory: like a sequestration, it deposits the sum which is in dispute between the parties, provisionally, with the plaintiff, upon his giving sufficient security, instead of its remaining in the hands of the defendant, pending, and subject to, the final issue of the cause.

D. C., Colombo, No. 4,762. } *Ahamado Lebbe* v. *Sultan Marikar.* April 19.

Stark, J.,—In all cases in which by the rules and practice of the courts, any act is required to be done within a particular number of days, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday or public holiday, in which case the time shall be reckoned exclusively of that day also.

"Supreme Court Minutes," 1844.

May 27.

D. C, Amblangodde, No 4,280 } *Carloe* v. *Ossappoowe.*

Per Curiam, (OLIPHANT, C. J., CARR, J., and STARK J.):— We all agree that the security bond is bad. The proxy does not authorize the proctor to whom it is given, to sign the security bond in appeal. The Chief Justice, and Senior Puisne Justice, (the second Puisne Justice dissenting), are of opinion, from the analogy of the practice in the House of Lords and Privy Council, and from the address and nature of the petition in appeal, that, strictly speaking, it is business which ought to be done by a proctor of the Supreme Court. But the whole court is of opinion that in the present state of the out-station courts as regards proctors, it is not practicable to confine this business to proctors of the Supreme Court, and that it is expedient to construe the late rules of court (12th December, 1843) on the subject, according to the plain and literal meaning of the words, namely, that appeal petitions may be prepared and signed by any proctor whatever.

July 12.

D. C., Colombo, No. 9,794. } *Ibrahim* v. *Saibo Lebbe.*

CARR, J.,—Any admission of a balance, or acknowledgment, made by one party to another that a sum of money is due to the latter, is sufficient *prima facie* evidence to entitle the plaintiff to recover that sum on an account stated; and it is not necessary to give evidence of the several items constituting the account. If the account be stated also verbally, the witnesses present should be summoned to prove the same; but if in writing, then the same should be produced, and the defendant's signature proved.

July 25.

D. C., Colombo, No. 11,202. } *Kuda Appu* v. *Baba Appu.*

CARR, J.,—Case remanded—the word "ox," plural "oxen" (species *bos*,) is defined in Johnson's, Walker's, and Sheridan's Dictionary to be "the general name for black cattle;—a castrated

bull." And the name of ox or bullock is commonly used in this colony as the general name of horned cattle distinguished from buffaloes." "Supreme Court Minutes," 1844.

Upon an indictment for stealing a bullock, it was objected in arrest of judgment that this description applied only to "a young bull," but that the evidence proved that the animal stolen was a *bull*. On the point being reserved for the collective court, the judges were of opinion that the indictment was sufficiently proved as to the description of the animal stolen; but the judgment was arrested on another objection, viz: that the animal was proved not to belong to the person laid in the indictment as the owner, nor to be in his possession, but to belong to another individual.

D. C., Kandy, No. 16,016. *William Wise* v. *Ibrahim Sahib.* July 30.

CARR, J.,—Since the new rules of the 5th July 1842, it has not been the practice of the district court of Colombo to allow general demurrers, excepting to the sufficiency of the libel in general terms, without shewing specially the nature of the objection. Although the practice of English pleading is to allow demurrers in such general terms, yet, as the party demurring must enter the exceptions intended to be insisted on in argument in the margin of the demurrer books he delivers to the judges, (Arch. Pr. vol. 2, p. 9), there really exists little difference therein from the shorter course prescribed by the new rules.

D. C., Colombo, No. 6,587 *Daniel Appu* v. *Sultan Marikar* Augt. 6.

CARR, J.,—It is correctly stated by the district judge that there are precedents holding that the possession of joint-tenant, coparcener, or tenant in common, is not an adverse possession; but those decisions are unfortunately founded wholly on the general law, (*Fairclaim* v. *Shackleton*, 5 Burr. 2604, and Roscoe, *Civ. Evid.* p. 329,) independent of the express provisions of the Ordinance. But the Ordinance of Prescription, No. 8 of 1834, has not simply declared that a possession of ten years adverse to or independent of that of the claimant shall give a prescriptive title, leaving it to the court to decide what is in law an-

"Supreme Court Minutes," 1844.

adverse possession, but in the parenthesis in the 2nd clause of the Ordinance it is also declared what shall be considered such an adverse possession under that Ordinance. And upon all recent cases this court has uniformly held that, under that parenthesis, there can be no exception drawn in favor of the possession of one co-heir, joint-tenant, or tenant in common not being adverse to the other from the tenure of their estates alone: and looking to the evil arising from the extreme subdivision of land in this colony under the existing law of succession, it may be reasonably presumed that the Legislature intended to annul all distinctions in law between the possession of such persons and others.

Augt. 17.

D. C. Matelle, No. 4,138. } *Loku Banda* v. *Sirimalralle.*

Carr, J.,—The district court has certainly fallen into a great blunder in examining the notary and two attesting witnesses to the deed without ever putting it into their hands for them to identify—"A witness cannot properly be asked on "cross-examination whether he had written such a thing; the "proper course is to put the writing into his hands, and ask "him whether it is his writing." *Queen's case*, 2 B. & B. 293. As to the power of the court to recall the witnesses, the district court under the 28th rule, seqt, 4, and sect. viii. of the rules of the 5th July 1842, has full power to call for any further evidence during the trial it may think necessary, and also to suspend its decision for it; and even in a criminal case, where the prosecutor's counsel closed his case, and the counsel for the defendant had taken an objection to the evidence, the judge may make any further enquiries of the witnesses he thinks fit, in order to answer the objection. *Remnant's case* R. & R. 136.

D. C., Colombo, No. 4,408. } *Punchyhami* v. *Kettady Rala.*

Carr, J.,—The proctor, Mr. Van Haght, is disallowed his costs on both petitions of appeal. It is the duty of every proctor to carefully peruse the proceedings on being employed to draw any petition of appeal or other pleading. The plaintiff in her libel and replication has relied not only on her claim by inheritance from adoption, but also

a prescriptive right to the lands in dispute from fifteen years possession thereof, since the verbal transfer on her marriage, but in the appeal petition drawn by Mr. Van Haght, it is alleged Mudelihamy had interrupted possession of the lands in dispute up to his death three years ago. "Supreme Court Minutes," 1844.

The intervenient's claim moreover being adverse to the plaintiff's, Mr. Van Haght ought never to have allowed himself to be employed to draw the petition of the intervenient, and this court will not sanction any such disreputable proceeding.

D. C., Kandy, No. 16,417. *Buller, Q. A.* v. *Perera* Dec. 3.

The Queen's Advocate, as plaintiffs, sued the defendants for the recovery of a joint and several debt due to the crown. On the failure of the defendants (save the first) to file answer, plaintiff moved for judgment against them. The D. J. disallowed the motion in these terms ;—

"The Ordinance No. 14 of 1843 directed a certain course of preliminary proceedings being resorted to, previous to the ordinary proceeding being resorted to, which preliminary proceedings have not been adopted in the present case. The 3rd clause of the Ordinance after enumerating the steps to be taken, says that any further proceedings which may he had therein, shall be according to such general rules of practice as now are or hereafter may be framed by the judges of the Supreme Court. No new rules have been framed since the passing of the above Ordinance in lieu of the 6th section of the R. & O. of the 1st October 1833 entitled *Revenue Jurisdiction*, which section was revoked on the 21st December 1842. So the district judge apprehends that the *general rules* to be resorted to, after the preliminary steps required by the Ordinance shall have been gone through, are those made for the *Ordinary Civil Jurisdiction*. It has been contended by the D. Q. A. that it is discretionary for the Government Agent to proceed under the Ordinance or not, but the district judge cannot concur in this view, for the Commissary General, the Surveyor General or any other public officers, may have entered into contracts on behalf of the crown, yet they could not in such case avail themselves of the Ordinance, unless at the discretion of the Government Agent, which the district judge does not believe could have been the intention of the legislature. The express provision made in the Ordinance No. 12 of 1844 that all suits at the instance of the

crown shall be instituted in the name of the Queen's Advocate, makes no difference in the question, for the district judge is of opinion that such powers had been previously vested in the Queen's Advocate."

On appeal, the order was set aside and interlocutory judgment entered against all the defendants excepting the first (according to the 4th section of the general rule of court of the 17th June 1844,)

CARR, J.,—This action can clearly be maintained by the Queen's Advocate without having recourse to the remedy given under the Ordinance, which does not take away the remedy at common law; (Com. Dig. tit. *Action upon Statute*, C; Saunders *Pleading*, 830 ;) and the Queen's Advocate may, therefore, sue under the Ordinance or not, as the circumstances of each case require.

It often happens that a crown debtor previously conceals or makes away with all his property; and if the view of the district judge were correct, the debtor would thereby successfully evade and estop the crown's prosecuting him for the debt due to it.

The Supreme Court considers moreover that it is discretionary for the Government Agent to proceed under the Ordinance, and not imperative on him (but he is subject of course to the order of Government thereon as on any other point of duty.)

The object of the legislature in authorising the Government Agent or his Assistant or Deputy to act, not only upon his own knowledge, but also on notice to him given of any debt having accrued due to Her Majesty, was obviously to include (amongst others) the very case suggested by the district judge, as it was preferable in conceding such summary powers to confine the exercise of them as far as practicable to one channel, and to vest such extensive discretion in the principal executive officer of the district, and those acting on his behalf or authority, rather than vest the same generally in the respective officers of the various subordinate departments of the revenue.

Dec. 6. D. C., Kandy, No. 11,266. *Ukku Ettena* v. *Omav Lebbe.*

Plaintiff obtained judgment and defendant appealed, but before the case was heard in appeal, it was found that the evidence taken in the case and the judgment pronounced thereon by the district court had been abstracted from the record

whereupon plaintiff moved for and obtained a rehearing of the case, with defendant's consent. Plaintiff was however non-suited at the close of trial. "Supreme Court Minutes," 1844.

On appeal, affirmed as follows, *per Curiam*, (Oliphant, C. J., Carr and Stark, J. J.) :—

After the abstraction of the evidence and judgment, the plaintiff moved the district court that the case may be re-fixed to hear evidence *de novo*, in which the defendant acquiesced, and on the day of trial both parties appeared, and evidence was adduced on both sides and judgment given. The court holds that such proceedings are tantamount to a new trial of the case with the consent of both parties, and will not disturb the judgment on the ground of judgment having already been given.

D. C., Amblangodde, No. 4,497. } *Babachy* v. *Leonis*. Dec. 18.

Per Curiam:—The libel states that the plaintiffs were "seised and possessed as of their own property" of &c. These words are obscure, and leave the defendants in uncertainty whether the plaintiffs set out right of property or possession only. This part of the libel must therefore be altered. The libel is also defective in not stating that the defendants ejected the plaintiffs from the *owitta*.

The court is further of opinion that the description "Maha Bandarawatte" as explained by the assessors is not sufficiently definite and that the *Owittes* are not sufficiently described. The libel prays that the defendants be expelled and the plaintiffs placed in possession, and there is not sufficient description to enable the fiscal to execute the decree of the court if it should be in favour of plaintiffs; costs to stand over.

D. C., Batticaloa, No. 8,933. } *Chinnetamby* v. *Wennys*. Dec. 23.

Per Curiam:—By the Ordinance No. 5 of 1835 the Proclamation of 23rd September 1799 is declared to be in force, in so far as 'that the Administration of justice and police within the 'settlements then under the British dominion, and known by the 'designation of the Maritime Provinces, should be exercised by

"Supreme Court Minutes," 1844.

'all courts according to the laws and institutions that subsisted 'under the ancient Government of the United Provinces,' and 'these laws and institutions are by the said Ordinance to con-'tinue in force, subject,' &c.

The Supreme Court has every reason to believe that the the laws and customs of the Tamils residing in Batticaloa, regarding the rights of succession of property, were never interfered with by the courts of judicature under the Dutch Government; and the special customs of the *Moquas* and *Wanniahs* were recognized in a case at the last sessions holden at Jaffna, without its even being contended that they were abrogated.

Dec. 23.

D. C., Galle, No. 10,883. } *Huskison* v. *Whiteside.*

Per Curiam :—The Supreme Court is of opinion that the affidavit of Mr. Vanderspaar, which was the only one put in, is insufficient, inasmuch as it only stated "that he doth verily "believe, and hath good grounds for believing, that the plaintiff "intends to leave the jurisdiction of the court,"—whereas it ought to have set forth facts indicative of such intention.

The court is further of opinion that no authority has been cited, and that no authority can be cited, to warrant the arrest of a plaintiff, at the instance of a defendant, for the purpose of obliging him to give security for contingent and untaxed costs.

Dec. 30.

D. C., Colombo, No. 35,800. } *Dias* v. *Perera.*

Per Curiam :—The court is of opinion that in an action of defloration, it does not appear, from the authorities cited that the plaintiff must make oath of previous virginity in order to maintain the action, nor that the same must be alleged in the libel.

In the form in which this libel is drawn, in which damages are claimed for breach of promise of marriage, no oath could be admitted according to the English law of evidence, and consequently cannot be admitted in this island.

D. C., Chilaw and Putlam, No. 7,521. } *Calu Appu v. Saibo.*

"Supreme Court Minutes," 1844.

Per Curiam :—Two defendants each lent an equal sum to the plaintiffs, who received it in different amounts, and mortgaged their respective premises in security. The bond expressed that the creditors are to possess the lands as they wished. They possessed by each taking a half, and possessing it separately. One of the creditors being in want of money received the sum advanced by him from the debtors, and put the plaintiffs in possession of the half. The other creditor entered and cultivated the half so given up, and maintained his right so to do. The Supreme Court is of opinion that he had no right to occupy more than the half which he elected to possess. He advanced half the money, and he had a right to possess half the premises ; and the other creditor has a right to give up the possession of his share, on being paid his money, when he pleased. The judgment is therefore affirmed with costs.

D. C., Negombo, No. 10,943. } *Cornalis Appu* v. *Carroll.*

"Supreme Court Minutes," 1845.

Feb. 4.

Per Curiam :—Set aside. Costs to stand over. Notice of motion for a stay of proceedings until the plaintiff finds security for costs, must be given to the plaintiff. It is not clear that the plaintiff, a native of this island, residing in it, possessed of property within it, and having no intention to remove therefrom, can be called on to find security for costs, on these grounds only, (*sic*) that he does not live within the district in which the action is pending, and has no property therein. The plaintiff may have good grounds, and should have had time given him to show cause against such security being demanded.

D. C., Negombo, No. 7,653. } *Simon* v. *Batteleapatera.*

April 14.

Per Curiam :—The court has no power to order surveys : if it is necessary for the proper understanding of a case, on the day of trial, that the plaintiff should have a chart or diagram, and a surveyor to explain the same as his witness, and be not so provided, the defendant will either be absolved from the instance, or the plaintiff allowed another day to prove his case, on payment of all costs. But the court has no power to interfere by dismissing a case, because a party cannot pay the costs of survey ordered by the court.

"Supreme Court Minutes," 1845.

July 9.

D. C., Ratnapoora, No. 3,582. } *Cornelis Soyza v. Jeronis Silva.*

Oliphant, C. J.,—If a suitor employs a proctor, it is not expected that the suitor shall be present at the trial, and the illness of the proctor, if known to the court at the time, is a good cause for postponing the trial on payment of the costs of the day.

July 11.

D. C., Jaffna, No. 4,517. } *Sidavy* v. *Sinny.*

Per Curiam :—In this case the district court of *Tenmoratchy* and *Patchelupalle* condemned the appellant, a proctor of that court, (who had reported that the plaintiff, a pauper, had a good cause of action,) to pay all the costs of this suit, excepting those of one defendant, on the ground that, " had he made the slightest " enquiry from the witnesses, or the most cursory examination of " the documents upon which the plaintiff founded her claim, he " would never have reported favorably for the plaintiff." At the time when the decree was made, (2nd September 1844,) the appellant was not proctor for the plaintiff, the latter having given a proxy to Mr. Williamsz on the 31st March, 1843. Neither was the appellant in court or residing at Chavagacherry, nor does he appear to have had any notice to attend the court when the judgment against him was pronounced ; nor, so far as appears on the proceedings, had he any notice of the judgment until the 27th of March 1845, and after the case had been transferred to the district court of Jaffna. On the next day, he showed cause why he should not pay the costs, but the district court of Jaffna held, that as he had not appealed against the judgment of the district court of *Tenmoratchy and Patchelapalle*, it could not interfere, and that full effect should be given to the judgment. The appellant appealed and the whole case was reserved for the consideration of Supreme Court at general sessions ; and the opinion of the Supreme Court was that there was nothing in any document filed which should have satisfied the appellant that the plaintiff had no good cause of action, and that it was impossible to conclude that the witnesses told the appellant the same story they did in court, and generally that there was not such gross negligence on the part of the appellant as to render him liable for the costs. And the court further found that, at the time when judgment was given by the court

of *Tenmoratchy* and *Patchelapalle*, the appellant was not employed in the case, and was not presumed to be in court or to know anything of the judgment, and that therefore the judgment was not binding on him, and so far as regards him it should be reversed.

"Supreme Court Minutes," 1845.

D. C., Chilaw and Putlam, No. 6,666. } *Jayewardene* v. *Seniweratne*. July 11.

In this case, the D. J. dismissed plaintiff's case and cast him in costs by decree dated the 26th August 1840. Defendant took no step for the recovery of the costs awarded by that judgment, until the 29th of November 1843, when, on the application of the defendant's proctor, it was ordered by the district court that the plaintiff do shew cause why a writ should not issue. The plaintiff contended that the debt had prescribed, it being, as he called it, a "book account," and the application for execution not having been made until after the lapse of three years. The district court ordered that execution should issue.

On appeal, *per Curiam*: Affirmed. In the *Censura Forensis* part 2, lib. 1, ch. 31. p. 142, it is laid down as one of the requisites of a sentence—" *ut sumptuum et expensarum condem-* " *nationem, aut compensationem contineat. Regulariter enim victus* " *victori in expensas judicis arbitrio taxandas, et moderandas,* " *condemnari debt.*" It is also stated in Van Leeuwen's *Institutes* that the costs are part of the sentence, p. 631 *et seq.* This is, therefore, no book debt between the plaintiff and the defendant, but a judgment debt which has not prescribed. With regard to the costs not having been taxed until after three years after the sentence, this does not affect the case, for the costs were given by the judgment and the rule *certum est quod certum reddi potest* here applies.

D. C., Galle, No. 8,262. } *Weireman* v. *Jayesondra*. July 24.

Per Curiam,—The parties in this case brought an action jointly against one Theodoris de Silva Ameresinhe Aratchy in the district court of Galle, 3,879, and it was decreed therein, " that the case be dismissed, the plaintiffs paying the costs." A writ of execution was issued upon that judgment against both

"Supreme Court Minutes," 1845.

the plaintiffs and one of them paid the whole costs, and after the lapse of three years, brought the present action to recover half the amount so paid by him, from his co-plaintiff, the present defendant. The defendant pleaded the 5th and 6th clauses of the Ordinance No. 8 of 1834 in bar of the plaintiff's claim, and issue was joined on their applicability to the case. The district court held the plea of the defendant good, and the case having been brought before the Supreme Court on circuit, by appeal, it was reserved for the opinion of the judges collectively, and argued before them at the general sessions.

It has been urged before this court on the part of the respondent that the appellant was not in the former case liable to pay the whole of the costs, and that each of the co-plaintiffs in that case was by that judgment bound to pay only his share of those costs and no more. (Voet. lib. 4. tit. 1. s. 24.) ; that the payment upon which the present action is founded was voluntary, and that therefore the case comes under the 5th clause of the Ordinance as either a " contract relating to moveable property," or " money lent without bond &c. ;" that monies and debts of this kind class under the head of " moveable property," (Van. Leeuwen's *Comm.* p. 102., Swinburne *On Wills*, vol 3, pp. 928, 936) ; but it might even fall under the head of " money lent," as the distinctions of " money paid," " laid out and expended," " had and received," are creatures of the English law, by which they would all class under the head *mutuum* ; that the appellant as the *negotiorum gestor* of the respondent, his co-plaintiff in the former case, paid money for him, and the transactions ought to be looked upon as a *mutuum.* (Vinnius *Inst.* lib. 3. tit. 17. p. 627) ; that there is a case similar in some respects to the present, and in which such a transaction has been, even by the English law, looked upon as a case of money lent, (*Wade* v. *Wilson,* 1 East, 195) ; that the Ordinance, like the English Statutes of Limitation, which have been emphatically termed " Statutes of Repose" (2nd Chitty *on Stat*, p. 697, *in note,*) ought to be liberally and beneficially expounded, and therefore ought to be considered to include cases of " money paid," " laid out and expended" &c., (2nd Chitty *on Stat,* p. 702, Blanchard *on Limitations,* p. 87) ; that the appellant had no cession of action, and has not therefore the same rights as the judgment creditor ; that without this cession he has *proprio nomine* an action *pro mandati* or *pro socio* ; (Vinnius lib. 3, tit. 17. p. 627, Voet lib. 45. tit. 2, sect. 7, Pothier *on Obligations,* vol. 1. p. 166 ;) and the judgment not being the basis of the present action, but only collateral evidence in support of it, the prescription of a judgment would not apply.

But this court is of opinion that although the Dutch law may be as stated by the learned counsel for the respondent, yet this court is bound by its decision of the 28th December 1837, in the *Amblangodde* case No. 1,676,* and by the practice having been invariably such as stated therein. It is now established that when parties are condemned in costs generally, they are all liable *singuli in solidum,* and it follows, therefore, that this was not a voluntary but a compulsory payment. The court is further of opinion that an argument cannot be maintained, as indeed none was offered, that the case comes under the 6th sec., and the only question has been whether it comes under the 5th. As the payment is held to have been a compulsory one, this action cannot be said to be for the recovery of "money lent." Neither is it found upon an unwritten "promise contract, bargain, or agreement relating to moveable property," and the only question which remains for consideration is whether it is an action "for any moveable property." The words "moveable property" must be construed in the limited sense of corporeal property, exclusive of choses in action. For, otherwise, after the words "moveable property" should have been inserted the words "except as aforesaid," to shew that the 5th section was not repugnant to the two immediately preceding it, and which provide different terms of limitation for the moveables (taken in the wide sense of the word) therein mentioned. Neither can "moveables" have been intended to comprehend money; for then there would have been no occasion to add the words "or to recover money lent." The court has no reason to suppose that under the term "moveable property," it was meant to include either actions to which a plaintiff had a right by cession or which he was entitled to bring *eo nomine.* "Supreme Court Minutes," 1845.

Set aside and plaintiff to recover from the defendant the sum of £6 15*s.* 3¾*d.* and interest.

C. R., Jaffna, No. 275. } *Sedembranader* v. *Sangerapulle.* Sep. 9.

Oliphant, C. J.,—The country law either follows or concurs with the Dutch law in so far as, when interest is in arrear, and such arrear exceeds the principal, no more interest is allowed than the amount of the principal, that is to say, the principal must be paid, and a sum equal thereto as interest, but no more.

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* See Morgan's *Digest* p. 203, par 545.

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(It may be difficult to say upon what grounds such a rule was established; it is unknown to the English law.) But when interest is not in arrear, no such principle as has been recognized by the commissioner, obtains in the Dutch law, nor in the country law; at least, the case has never been attempted to be argued. Neither is there any equity, so far as the judge can perceive before whom this case comes, in the principle. On the contrary, it is equity that every man should receive back the whole amount of the money he has lent, and a reasonable compensation for its use. Upon the principle adopted by the commissioner, one who has lent say £100 at ten per cent for ten years, and who has regularly been paid £10 a year as interest, would not be entitled to demand his £100 at the end of the tenth year, because he had been paid that sum in the shape of interest. He has, thus, lent £100 for ten years, and is paid back by instalments of £10 a year, getting no compensation whatever for the use of his money. Is this equity? The same reasoning holds if interest should be paid for 30 years, in which time the lender would have received three times the amount of his principal, as in the case in dispute. The lender is the party wronged if he does not get £10 every year, and his principal when he calls up the bond. The defendants being absolved from the instance on this point, it is ordered that the judgment of the Court of Requests of Jaffna be set aside, and the case be decided on the general merits thereof.

Sep. 23.

C. R., Negombo, No. 164. — *Lieme* v. *Lieme.*

Oliphant, C. J.,—The deed of sale expresses that the consideration had been received, and such expression is clear and unambiguous. By the English law of evidence, made the law in this colony, the plaintiff is estopped from shewing that no money was paid. Phillips *On Evid,* ch. 7, sec: 4, edit. 1843, p. 351, vol. 2.

Oct. 31.

D. C., Negombo, No. 10,256. — *Peris* v. *Fernando.*

Carr, J.,—The proceedings in this case are remanded back to the district court to refer the petition to sue an appeal *in formâ pauperis* to the proctor in rotation, as described by the 43rd cl. of the 1st sec. of the General Rules and Orders of the 1st October

1833. Such reference ought to be always made to some proctor who has no interest in the event of the suit, and who can act independently between the parties. It is a public duty that he has to perform, and one which is imposed on him under the rules of court, to ensure the more effectual administration of justice between the parties, as whenever one party is improperly allowed to sue *in formâ pauperis*, he gains an undue advantage over the opposite party, and the litigants are thereby placed upon unequal terms. The proctor, therefore, who has been retained for the appellant throughout the case, ought never to be called on to discharge this duty, inasmuch as his services are retained in favor of his own client, and he may be compelled on such a reference to act against his own client, whilst he has also himself a personal interest in carrying on the appeal, because, if the decree of the district court be thereupon reversed, he may recover his full costs from the opposite party, which he might despair of getting, otherwise from his client being a pauper. " Supreme Court Minutes," 1845.

D. C., Negombo, No. 10,866. } *Fernando* v. *Fonseka.* Oct. 31.

Carr, J.,—According to the English law there cannot be a joint or mutual will, an instrument of such a nature being unknown to the testamentary law of that country. Williams *On Executors*, p. 9. But by the Dutch-Roman law married persons are accustomed to make a joint last will, which is called "a mutual testament," and which, although contained in one paper, is held as two distinct wills, wherein each disposes of her property. *Vander Linden*, p. 129. *Van Leeuwen*, p. 223. The will of the deceased therefore ought to be proved. Case remanded. District Court to grant probate upon will being established by evidence, or on failure thereof, to grant administration.

D. C., Colombo, No. 36,701. } *Tambapulle* v. *Sanawiere.*

Per Curiam :—Opposition has been made to provisional judgment being granted in this case upon several grounds, the first of which is that the libel and summons were not so framed as to entitle the plaintiff to provisional judgment.

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Dec. 6.

The libel states in substance that the action arises upon promises of the defendant unperformed, and narrates that the defendant on a certain day accounted with the plaintiff for moneys then due by him to the plaintiff; that a balance of £259 12*s*. was found due, which the defendant promised to pay on request; that the defendant has not paid though requested; and prays condemnation in the sum. The libel than calls on the defendant to confess or deny his signature "to the account hereunto annexed, marked Lr. A, and to show cause why he should not be condemned provisionally to pay to the plaintiff the said sum of £259 12*s*. with legal interest thereon from the institution of this suit until payment in full."

The summons requires the defendant to appear and answer to the claim of the plaintiff for the sum of £259 12*s*. due upon an account dated 10th August 1842.

The answer makes no objection to the libel as being informal, or as not stating the cause of action with sufficient precision; nor does it object that the summons is at variance with the libel as regards the cause of action, but pleads that the first item in the account due by the defendant was included in another account, made by the plaintiff, defendant, and other parties, their partners, and which he, the defendant, has settled, and that it was by mistake included in the account between the plaintiff and the defendant. The plaintiff in his replication denies the answer. The defendant admits his handwriting, and puts in an affidavit of a third party supporting his answer.

The rule of court which relates to the form of libels, simply requires that the libel shall state the cause of action or complaint, as shortly as the nature of the case will admit, and the relief or remedy which the plaintiff seeks. Certainly the plaintiff has not strictly complied with the rule. He has not contented himself with stating that the defendant was indebted to him, accounted with him, and admitted a balance, and prayed that he, the defendant, might be condemned to pay the same; but has unnecessarily stated that the defendant promised to pay the balance, and has stated such promise to be his cause of action. At the same time, the defendant may have made such promise, and such promise is, if proved, only additional evidence of the defendant's liability upon a prior obligation.

The court will not turn a plaintiff round because his pleader uses words in the commencement of his libel which have a technical meaning in English pleading, but which convey no precise meaning to any person unacquainted with that mode of pleading. The court will reject as surplusage all that is said in the libel which has an aspect towards the English

"Supreme Court Minutes," 1845.

action of assumpsit, and let the libel stand upon the liability of the defendant to pay that which was found and admitted to be due from him on an account taken. And in this view of the case no objection can be made to the summons which agrees with the essential part of the libel. The court comes to this conclusion the more readily, as the answer shows that the confusion in the libel has wrought no injury to the defendant in any way. As to that part of the libel which prays for provisional condemnation, the court is of opinion that the "said sum of £259 12*s*." must be taken to relate to that very sum mentioned in the former part of the libel which upon taking the account was found to be due from the defendant to the plaintiff, and that the account Lr. A. is to be one and the same accounting, as the defendant does not deny in his answer that it is so. The court, therefore, holds that the first objection is not valid.

2.—The next objection is that the account rendered and signed by the defendant is not a liquid instrument. Figures are erased and others substituted, in which case provision ought not to be granted. Wassenaar *Jud. Pract.* p. 129; Sande, bk. i., tit. 8, def. 3; Mascardus *Const.* 1261.

The court, on comparing all the authorities which treat of this point, comes to the conclusion that a *vitium* or defect, whether blot, tearing of the paper, erasure, interlineation or the like, must be of considerable consequence, and impress the mind of the judge with a suspicion with reference to the important parts of the document. In the account in question, there are two erasures, neither of which occur in the debit side of the account embracing the items which express the causes of the debit; nor in the credit side of the account containing the items of discharge, but a palpable *error calculi* had been made in the summing up of the credit side, and which necessarily occasioned a corresponding error in the balance. These two errors were corrected, the figures, which correct addition and subtraction required, being written over the erroneous ones. Is this a defect of great consequence? Does it impress the mind of the judge that the defendant is called upon to pay anything more than he admitted to be due? Does it lay the plaintiff under any imputation of fraud? Will it subserve the ends of equity (on which the whole system of provisional judgment is based) to turn the plaintiff round for miscomputation which can injure no one? The court thinks not, and that the error is not material. The court is further opinion that the document contains the *causâ debiti*, as expressed in every item of the debit side of the account.

It may be further said that the writing is not in the form

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and terms commonly employed in an obligatory instrument, and may therefore have been made as a memorandum for private use only, but, as it is produced by the creditor therein, it must be presumed to have been intended to have been delivered; and moreover, by the answer it is admitted to be an account stated between the plaintiff and the defendant.

3.—It is further objected that this document is an obligation and cannot be received in evidence, not being duly stamped; and that, if no obligation, provision cannot be granted.

The court is of opinion that the document in question cannot be called an obligation, it is an admission of what is due by the debtor at a certain date, upon a former obligation or obligations existing between himself and his creditor. The items in the accounts show a diversity of obligations : some may have been written contracts, other verbal agreements. But a mutual obligation lay on both parties to perform these obligations, totally independent of this document, which was not meant to abrogate them, and come in their place ; but is merely an admission by the defendant that, at the date, the parties stood in such a position as to debit and credit upon their respective obligations. There is no word in the stamp act requiring a stamp on an account stated, nor an any document similar to the present. This account therefore does not require a stamp, and so is admissible evidence. But it is said a provisional claim can only be founded on an obligation, or on a merchant's accounts. The text books hold no such doctrine, unless where, sometimes, the word 'obligation' is solely used as being the class on which provisions are most usually granted ; but it is clear that any other instrument signed by the debtor is sufficient. The appendix to the Law Dictionary expressly uses the words—"an acknowledgment of the party." A receipt signed by the creditor is sufficient to prevent provision. A receipt is an admission of money paid. Surely an admission of money due should fall under the same rule.

4.—The only remaining point for consideration is the effect of the affidavit of a third party which asserts that the large item in the account and which makes the whole balance against the defendant has been settled by another adjustment or agreement, and should not figure in the account at all.

The writers on Roman Dutch law are much divided on the admissibility of such evidence, and amongst those against it is *Voet*. The weight of authorities seem nearly equally balanced. Perhaps the sounder principle is to permit no other species of evidence in opposition to a provisional judgment, which is not allowed in support of it ; and, if we consider the

facility with which affidavits can be procured in this island, in support of any falsehood however gross, expediency demands the rejection of parol testimony ; and the court, feeling itself at liberty under the authorities to reject affidavits altogether, will do so, at least when not more conclusive, and supported by stronger concurrent, circumstances, which carry a conviction of their truth to the mind, than occurs in the present instance. "Supreme Court Minutes," 1845.

C. R., Galle, No. 526. } *Abeyewardene* v. *Madoma.* Dec. 23.

CARR, J.,—If the plaintiff's bond gives him a mortgage of a share of a field in lieu of interest, and the plaintiff has, thereunder possessed such share ever since, the bond is not prescribed, and the plaintiff may, notwithstanding the lapse of time, recover thereon in a suit in the district court, if he be advised to institute the same.

D. C., Kurnegalle, No. 10,277. } *Mulkadoowawe* v. *Rang Ettena.* Dec. 24.

Per Curiam—In this case one individual claims chena land, situate within the Kandyan Provinces, from another individual. The district court non-suited the plaintiff who admitted that he neither held sannas, nor grant of any kind, and that no taxes or services had been paid or rendered for the same, conceiving that he was bound so to do under the 6th cl. of the Ordinance No. 12 of 1840.

The court is of opinion that the words in that clause "all chenas &c. in the Kandyan Provinces shall be deemed to belong to the crown, and not to be the property of any *private person claiming the same against the crown,*" refer only to suits in which the crown is a party ; and such not being the case in the present action, the judgment must be set aside, and the case remanded to the district court to be proceeded with,—

The Chief Justice doubting however, because, although the above reading is the most plain and obvious meaning of the words in question, still they will bear another more in accordance with the other parts of the 6th cl., viz : that "claiming the same against the crown" need not be confined to suits in which the crown is a party, inasmuch as all lands in the Kandyan Provinces belonged to the King, unless a grant or services were

"Supreme Court Minutes," 1845.

proved, and therefore, in all cases there must be a virtual claim against the crown, the original proprietor of all lands. And because, if the words are not taken in this last acceptation, chenas in the Maritime Provinces are generally in all suits, at all times, in all places, to be presumed the property of the crown, and, in the Kandyan Provinces, are to be deemed to belong to the crown only in a suit between the crown and a private party, which it can hardly be supposed was intended by the Legislature; and further, in reference to the 11th section, it might happen that, a chena land in the Kandyan Provinces might, in a suit between two private parties, be decided upon a ten years prescriptive title to belong to one of them, and a headman present in court, and who heard evidence of an encroachment, would be liable to a fine, if he did not inform the Government Agent of such encroachment. In all probability, the words "and not to be the property of any private person claiming the same against the crown" have crept into the Ordinance *per incuriam*. If we reject them, the whole of the parts of the 6th cl. are brought into accordance with each other.

Judgment set aside and case remanded to be proceeded with.

"Supreme Court Minutes," 1846.

Aug. 16.

D. C., Colombo, No. 34,826. } *Candappa* v. *Vanderstraaten.*

STARK, J.,—The Supreme Court having perused the record in connected case No. 31,535 and the evidence taken in the present case, is clearly of opinion, on the main question which arises here, that there has been on the part of the defendant, a culpable want of care and diligence in ascertaining the real facts of the case, in which he was employed by the plaintiff, and in preparing the evidence, pleadings, and appeal.

It is of the greatest consequence to the character of the profession, the safety of the parties, and the due administration of justice to require of and from all proctors proper care in the business entrusted to them by their clients, and more especially in cases where the clients are ignorant and illiterate; and to afford full redress to injured parties, where any proctor is deficient in requisite care. In respect, however, this is the first case of the kind here, the damages are modified.

Plaintiff appellant to recover from defendant respondent six pence as damages and all costs of suit including those in appeal.

D. C., Colombo, No. 38,134. } *Edmund Collier, agent and attorney of H. J. Albrecht, trading in Ceylon as C. D. Parlett and Co.* v. *Teagappa Chetty.*

"Supreme Court Minutes," 1847.

March 25.

Collier as above described, sought to recover from defendant £286. 19*s.* 7*d.* being balance remaining due to Parlett & Co., for the price and value of two Bengal Government bills of exchange sold and delivered by that firm to defendant, on the 22nd March 1841. The defendant pleaded in abatement another action (No. 33,125) pending against him for the same claim, at the instance of F. Lambe, as the then factor of C. D. Parlett & Co. At the trial plaintiff admitted that the cause of action in the both cases was the same.

It appeared that Lambe was for some time manager for C. D. Parlett & Co. The partners then were Albrecht in England, and Parlett in Ceylon. When Parlett was temporally absent from the Island, Lambe did the business by procuration. After Parlett's death in March 1840, Albrecht, then in England, sent a power to Lambe authorizing him to wind up the affairs of the firm, and giving him the general superintendence and management of the new business to be carried on in Ceylon by Albrecht on his own account, as C. D. Parlett & Co. The power authorized Lambe (*inter alia*) "to commence, prosecute, defend, discontinue, compromise and settle any actions suits or other legal proceedings," relating to the now firm, and to "use the name of the said Henry James Albrecht for these purposes." Under this power Lambe acted, and in negotiating bills and managing other transactions, Lambe signed C. D. Parlett & Co. Albrecht who came to Ceylon in January 1841 was present on 22nd March 1841 along with Lambe at the sale of the bills of exchange in question, which was for the behoof solely of C. D. P. & Co. and was so entered in their books. The bills bore the endorsation C. D. Parlett & Co.

On the 14th April thereafter, Lambe instituted, in his own individual name, the suit No. 33,125 against the present deft ; no mention was made by Lambe in the libel of his constituents, C. D. P. & Co, although the proctor's original authority to institute that suit was a letter signed C. D. Parlett & Co. in the handwriting of Lambe. On the 11th May 1841, Lambe ceased to conduct, and Albrecht took the sole management of, the business. A letter was put in evidence dated 24th February, 1842 signed C. D. Parlett & Co, addressed to the proctor who instituted the suit No. 33,125 ; it was in the handwriting of Thompson, the then agent of the firm, and after referring to this and other cases, proceeded : "For these suits we request to

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receive from you a written acknowledgement that you consider yourself as proceeding solely on our account, and that you undertake to pay over to us such sums as you may receive in respect of them." It did not appear what reply, if any, was made to this letter. Another letter was offered in evidence by plaintiff from Lambe to Albrecht, relating to the capacity in which Lambe acted for the firm; but the D. J. rejected the evidence, on the ground that it was a private letter, and that Lambe and Albrecht might be colluding against the defendant.

Judgment of the D. C. (29th July 1845.) "The defendant has pleaded in abatement that another suit was pending for the same cause when this action was commenced, wherein Frederick Lambe the then factor of C. D. P. & Co. was plaintiff. Upon this plea issue is taken. It is admitted by plaintiff, (Collier,) that the cause of action is the same; but it is contended, that although Lambe, the plaintiff in the former suit, was in the employ of the firm, it was not in such situation as to entitle him to maintain an action in his own name, as he has done; and that, consequently the firm is not to be debarred from maintaining this action.

"This must be held a good plea if Lambe did, when he commenced the action, stand in such a relation to the firm as to entitle him to maintain actions, in which the firm was concerned, in his own name. The point, therefore, for consideration is, whether Lambe did stand in such relation, and in order to ascertain this, let us see, first, whether he stood in such a relative position as to be personally liable upon contracts entered into with him for the benefit of the firm.

"It is quite clear that a party is personally responsible if he does not disclose the fact of his agency. (*Story's Agency* p. 228.) But here it may be said that an agency was disclosed as the bills were endorsed C. D. Parlett & Co. It is true that this does disclose the fact of Lambe being an agent, but is it disclosed to whom he was such agent?—it being a well known fact that C. D. Parlett had been dead some years. But if a contract is entered into by an agent who is known to be such, and acting in that character, but the name of the principal is not disclosed, the same principle applies, and the agent is held responsible; and until such disclosure, it cannot be supposed that the contracting party would have entered into a contract, exonerating the agent, and trusting to an unknown principal, who might be insolvent or incapable of binding himself (*Story's Agency* p. 229.)

"I think therefore Lambe did stand in such a position as to make him personally liable upon contracts entered into by him on behalf of the said firm.

"The next point then comes, whether he could sue in his

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own name. Now, independently of the principle that he who can be sued can also sue, on the same subject; considering that the contract in this case, if such it may be called, was made with Lambe for C. D. P. & Co., and that the name of Parlett is fictitious; that the name of the real party concerned, namely Albrecht, does not appear throughout the transaction; and moreover that he was not generally known to be the principal of the firm, and did not usually reside in the island, I think that Lambe could well institute the action No. 33,125, and that the plea pleaded in this suit must be held good. It is accordingly decreed that the defendant be absolved from the instance with costs. Assessors concur."

From this decision the plaintiff appealed on two grounds: (1) that the court below rejected evidence whereby the true position of Lambe with C. D. Parlett & Co. would have appeared, and (2) that a broker was not by law permitted to sue in his own name, and without reference to the name of his principal.

Carr, C. J.,—It is considered and adjudged that the decree of the D. C. of Colombo of the 29th July 1848, be amended by the plea being over-ruled with costs, and by its being ordered that the present suit, and the suit, No. 33,125, be consolidated, when the court can, at the trial thereof, decide on the respective liabilities of the parties to pay the costs in such suit.

The S. C. thinks that the plaintiff ought to have intervened in the former suit, and that the relative rights of the parties could have been fully and well settled by the court upon the plaintiff's intervention therein, in lieu of his harassing the defendant with this separate suit; so far, therefore, as the suit may appear to have wrongly occasioned further litigation and expense, the plaintiff should be made, on the final decree, to bear the costs thereof. The S. C. does not consider, on the facts disclosed, that Lambe can be considered as a factor, or as having any right in himself to institute the first action in his own name, nor can the S. C. say how far the same was ratified by the letter from the plaintiff's attorney to Mr. Beling, (the proctor) without knowing what answer was sent to it.

The whole case must be viewed in the nature of a bill of interpleader (*Drinkwater* v. *Goodwin*, Cowp. R. 251, 255), which is stated to be similar in some measure to the *tertius interveniens* of the Civil Law, (*Mad.* 239.) and wherein the separate claimants can be compelled by the court to interplead, so that the court may adjudge to whom the debt is due, and the third persons applying for relief be indemnified and protected against their separate actions, if they have commenced the same," [*Murray's Reports*, pp. 92—98.]

"Supreme Court Minutes," 1847.

Mch. 25.

D. C., Colombo, No. 11,176. } *Livera (widow) v. Domingo Peris.*

The suit was instituted against defendant as executor of Bastian Fernando Lekame deceased, to recover the sum of £5. 12*s.* 6*d.* alleged to have been borrowed and received by the said B. F. Lekame, from the plaintiff's late husband, on a bond dated the 5th May 1832. The land mortgaged by the bond was to be possessed by mortgagee in lieu of interest; and the bond contained a mutual stipulation not to foreclose, or redeem the mortgage till after the lapse of 5 years. It was alleged that the mortgagee entered into possession of the land on the execution of the bond, and that after his death, which happened about two years subsequently, his widow, the plaintiff, continued, and was at the institution of the suit, in possession under the mortgage.

The defendant denied the execution of the bond, and pleaded the 3rd cl. of the Prescriptive Ordinance, No. 8 of 1834.

It appeared at the trial, from the examination of the plaintiff, that her husband's brother, who was living, was administrator of the deceased's estate, that the estate had been long wound up, and the accounts of the administrator closed. On this admission, defendant moved that plaintiff be nonsuited, as the administrator was the proper party to bring the action; but the D. J. over ruled this objection, and refused the motion. It also appeared, from the inventory of the estate lodged in court by the administrator, that the sum sued for in this action was not included therein, nor was there any reference whatever made to it. The plaintiff proved the bond and adduced evidence of possession of land as alleged.

The D. J. pronounced the following judgment (19th October 1846): "The inventory file in the testamentary case No, 405, makes no allusion whatever to the mortgage in question, which the court presumed it would have done, had the amount been still really due at the time. The estate of plaintiff's late husband was closed in April 1848 in the late D. C. of Negombo, and she commenced this action in 1845. The evidence adduced being unsatisfactory, and the testimony of the witnesses as to the plaintiff's possession not altogether to be depended on, it is decreed, the assessors concurring, that this case be dismissed. Defendant is absolved from the instance with costs."

The plaintiff appealed.

Carr, A. C. J.,—It is considered and adjudged that the decree of D. C. of Colombo be set aside and the case remanded for re-hearing on further evidence, with liberty to the parties to

amend their present lists of witnesses, and for the D. C. to give judgment *de novo*. Costs to abide result. "Supreme Court Minutes," 1847.

It has been urged by appellant's counsel that omissions in the inventories of administrators, are not unfrequent, and do not, accordingly, deserve the weight attached by the D. C. to the omission ; but in the present instance, the accounts of the administrator at least ought to have mentioned somewhere in them the mortgage, as the administrator has closed his accounts, and the plaintiff who is the widow of the intestate, alleged that the administrator delivered it (the land or mortgage) over to her at the closing of the estate. The administrator ought therefore to be made a witness, and examined to explain this omission. The plaintiff appears moreover to have made out a *primâ facie* case to call for the defence, and the evidence in reply".—[*Murray's Reports*, pp. 84, 87.]

D. C., Colombo, No. 10,442. } *Fernando* v. *Fernando*. March 30.

Carr, A. C. J.,—A preliminary objection was taken by the appellant's counsel, that the parties proceeded to trial and examined witnesses without any replication. The objection however comes too late from the defendants. On reference to Mitford's Eq. plead. pp. 252 and 257, and Mad *Ch. Pr.* vol. 2, pp. 451 and 453, it is said,—" A further answer is in every respect similar to, and indeed is considered as forming part of, the first answer ;" and " where by mistake a replication had not been filed, and yet witnesses had been examined, the court permitted the replication to be filed *nunc pro tunc*." *Blagdeu* v. *Cramlinglon*, 16 Nov. 1787, *Mosely* 296.

Plaintiff is herely allowed to file his replication *nunc pro tunc* to the amended answer.

As regards the merits of the case, the defendants having admitted the delivery of the cattle and pleaded a sale thereof, which they have failed to prove, and plaintiff is entitled to have his cattle restored to him by the defendants, or to recover their full value.

Decree of the court below is amended and defendant adjudged to return the cattle in question or else to pay them full value £18 15*s*. as claimed.

"Supreme Court Minutes," 1847.

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April 17.

D. C., Ratnapura, No. 85. } *In re* Pahalawette.

Carr, A. C. J.,—The practice in these cases, where the appointment of executor fails by the sole executor appointed in the will dying before probate, is to require the will to be similarly proved as though probate were taken of it by the executors, and to grant administration with the will annexed to the residuary legatee or person entitled to the greatest interest under the will, who is preferred to the next of kin, and the representative of the residuary legatee has in such cases the same right to administration.

As the next of kin however has a *primâ facie* right, the burthen of proof lies on the party claiming derivatively from a residuary legatee. See Williams' *Executor* 285.

Case remanded for proof of will &c.

D. C. Ratnapoora, No. 4,939. } *Wattoohamy* v. *Dingyhamy*.

Temple, J.,—In law the instrument upon which the plaintiff founds his action is illegal, and the consideration of it is what the English Law calls *champerty*, i. e. a bargain between the plaintiff and the defendant to divide the land sued for between them if they prevail at law. Whereupon the champertor (or the plaintiff in the case) is to supply funds to carry on the other party's suit. If the defendant had, in this case, raised an objection to the transaction, or had appealed against the decision of the district court, this court would have declared the whole transaction illegal. But as it is, the plaintiff appeals against the judgment of the district court as incorrect on account of its being conditional and not decisive, and the defendant has not appealed against the decision at all, nor has any question been raised against the validity of the transaction. Under these circumstances, and considering that from anything which appears to the contrary the plaintiff *bonâ fide* lent the money, without having any improper or oppressive object in view, the Supreme Court does not feel justified in setting the whole transaction aside. The plaintiff, however, cannot be permitted to recover the land, but only the money which he lent to the defendant, with legal interest.

D. C., Kandy, No. 2,690/19,472 — *Kirry Ettena* v. *Heteregedere Appu.* — "Supreme Court Minutes," 1847. Dec. 14.

The following is the judgment of the Supreme Court:—

In a former case, No. 69, the defendant's father sued the husband of the present plaintiff, during coverture, for the lands which were the subject of the present action. In that suit the plaintiff's husband, (Selappoo) in his defence, set up a claim to the lands in his own right, and independent of his wife, the present plaintiff. Selappoo failed in his defence, and the lands were decreed to the plaintiff in that case. In the present action, the plaintiff rested her claim entirely in her own right, and independent of her husband. The defendant pleaded the former judgment in case No. 69, with other grounds of defence. The district court found that the plaintiff had established a title by prescription; but that the former judgment was binding against the present plaintiff, on the ground that, as she might have been a party to that suit, the record was consequently in evidence against her, and in support of this quoted *Starkie*, 260.

By the Kandyan law, there is no permanent community of goods between husband and wife, and their respective estates remain distinct from each other. The husband in the former suit claimed the land as his own, independent of his wife, and the title of the wife was in no way put in issue. The Supreme Court, therefore, considers that the present plaintiff is not bound by the judgment against her husband, and that she can maintain this action; we agree with the court below that plaintiff has proved a prescriptive title. The judgment of the district court is set aside and the plaintiff decreed entitled to the lands.

D. C., Colombo, No. 36,718. — *Pottooma Natchia* v. *Sinnachy.* — "Supreme Court Minutes," 1848. May 30.

CARR, C. J.,—The plaintiff claims his own share only, and although he demands in his libel more than he appears to be entitled to, he must recover upon it "according to his title." His being, therefore, entitled to less than claimed in the libel does not render it necessary for him to amend the latter, nor form any ground for non-suit, although it may subject him in gross instances to pay costs. In *Doe* d. *Burgess* v. *Purvis*, 1 *Burr.* 326, LORD MANSFIELD said,—"This is an exceedingly "plain case. The rule is undoubtedly right that the plaintiff

"Supreme Court Minutes," 1848.

" must recover according to his title. Here, she has demanded " half, and she appears entitled to a third, and so much she " ought to recover." And this is so, whether the action be brought for an undivided, or a several and divided portion ; for the whole or a part. In *Abbett* v. *Skinner*, 1 *Siderf.* 229, where the declaration was for the fourth part of a fifth part, and the true title was only to one-third of one-fourth of a fifth-part, (which was only a third part of what was demanded), yet it was resolved that the verdict should be taken according to the title, and so if a plaintiff demands in his libel 40 acres, he may recover 20 if entitled to no more.

D. C., Colombo, No. 32,837. } *Don David* v. *Ederemanesingem*,

Carr, C J.,—The illness of an attesting witness, although he lies without hope of recovery, is not a sufficient ground for letting in evidence of his handwriting. *Harrison* v. *Blades*, 3 Camp. 457. Even if the notary had been dead, it would not have been sufficient to prove his handwriting, but one of the two attesting witnesses ought to have been called. *Cunliffe* v. *Sefton*, 2 East 183. *McCrew* v. *Gentry*, 3 Camp. 232.

D. C., Colombo, No. 2,098. } *Silva* and others v. *Alwis* and others.

The decree of the district court was reversed, and the case remanded for re-hearing, and judgment *de novo.*

Carr, C. J.,—The court is the more inclined to grant this indulgence, from its former order having been partially misunderstood ; as it certainly held therein that the plaintiffs must be taken to have closed their case from their conduct, though the more usual and the preferable course is to call upon the plaintiff to state that he has closed his case, and for the judge to make a minute of the plaintiff having done so, in his notes of the trial. The court also in the above order strictly confined its opinion to the points of practice, and was not called on, in any way, to express its view of the merits of the plaintiffs' case as it then stood, and certainly did not do so ; but being now called upon to state its opinion on the same, it must observe, that if the plaintiffs' case rested at present solely on their being

admitted to be the heirs of the two daughters of Miguel Dias, the original proprietor, who died some time ago and does not appear on the pleadings to be the last person seised, the court would now require the plaintiffs to adduce further evidence of title before it ejected the defendants; but as the defendants admit that Miguel Dias was entitled to one-fourth of the garden in dispute, and they claim the whole of that as having been possessed and inherited from him by their father Dines Dias, and add that his "sisters" (to whom the plaintiffs are the admitted heirs) "had their portions from other lands, and so we have always possessed," the onus is clearly thrown on the defendants to commence with their evidence, and prove the division or adverse possession by which their father thus acquired a right to his sister's share in their paternal property. Nothing is more common in this country than for the eldest son of a native family to continue in the possession of the paternal estate, allowing his brothers and sisters their shares as required; and if he or his children set up an exclusive right against the brother's or sister's claim by inheritance to such estate, by virtue of an alleged division or partition between them or an adverse possession, giving a title by prescription, he or those claiming under him, ought clearly to be called upon to prove the same in the first instance; and any other course would in the opinion of this court be fraught with the most dangerous consequences to existing rights of the natives in their family estates.

D. C., Ratnapoora, No. 5,311. } *Appu Naide v. Audoo Lebbe.* June, 2.

CARR, C. J.,—The proceedings are remanded back to require a fresh petition of appeal to be filed at the proctor's cost. The Supreme Court cannot receive any qualified signature of a proctor to the contents of a petition of appeal in the form adopted in this instance, "drawn by me on the statement of the appellant." If a proctor considers that he cannot conscientiously, or with due regard to his professional character and respectability, sign a petition of appeal in the usual form, he should inform his client thereof, and that he was at liberty to get his grounds of appeal taken down by the secretary,

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"Supreme Court Minutes," 1849. — Dec. 5.

D. C., Manaar, No. 2,054. } *Awuker Lebbe* v. *Mamel Tamby.*

Oliphant, C. J.,—If after judgment and before execution one of two or more plaintiffs dies, the survivors may take out execution in the names of all the plaintiffs; or, if they please, may suggest the death of one of them on the record, and take out execution in the name of the survivors.

"Supreme Court Minutes," 1850. — Dec. 7.

D. C., Colombo, No. 9,145. } *Suppramanian* v. *Sophia.*

In this case, plaintiff's libel was headed as follows: *Suppramanian Chetty, Agent of Na. Satappa Chetty* v. *Sophia &c.*

Temple, J.,—Case remanded. The Supreme Court considers that the plaintiff in this case does sue on his own behalf, and that the calling himself agent in the heading of the libel is but description and surplusage, and the Supreme Court further considers that though he has partners, he may sue in his own name. 2 Williams' *Executors*, 1,470 and cases there cited.

Lloyd v. *Archbold,* 2 Taunton 324,
Skinner v. *Storks,* 4 B. & A. 437,
Kell v. *Namby,* 10 B. & C. 21,
Garrel v. *Handley,* 4 B. & C. 666.

"Supreme Court Minutes," 1852. — Dec. 29.

D. C., Ratnapoora, No. 6,241. } *Appoo Hamy* v. *Mudelehamy.*

Carr, J.,—At the trial an application was made to postpone the case on account of the first defendant's proctor being unable to attend through illness (which is always considered a sufficient cause for postponement in the district court of Colombo); but the motion was disallowed on the ground that, "there were proctors present on both sides." The defendants, however, had severed in their answers, and appeared by different proctors. The affidavit also of the second defendant's proctor shews that he was quite unprepared to conduct the case of the first defendant, which was the most material in the cause. Under these circumstances, the appellants counsel has strongly urged the justice of granting a new trial, and the Supreme Court has been the more inclined to allow it, from its considering that the witnesses of the plaintiff have not been fully examined, and that the proof of the plaintiff's deed is open to great suspicions, as it is not in accordance with the Kandyan habits, that an old infirm lady of good family, and possessing property, would undertake a journey of some distance for such a purpose, without female attendance.

D. C., Ratnapoora, No. 6,294. } *Naidehamy* v. *Kaluhamy*. "Supreme Court Minutes," 1852. — Dec. 29.

This case was remanded with liberty to the parties to file a survey of the premises indicating also the situation of the pit from which the "great sapphire" was said to have been taken.

CARR, J.,—The Supreme Court cannot view this case in the same light that the district court has done. It is clear that the parties have all been employed in searching for gems on the premises, and if the action were merely to recover damages for the waste done thereby to the field, in rendering it less fit for future cultivation, the Supreme Court would not interfere with the present judgment, looking to the evidence, that all the parties had been concerned in the digging of the pits. But this suit obviously has wholly originated from a different cause, viz. that a large sapphire of very unusual size has been found on the premises, which has been secreted and withheld from the other parties, and evidence as to its value even has been suppressed. If this gem be a large sapphire of good colour, and without blemish, it must, from its great size, be of very considerable, nay of immense value. The plaintiff's 8th witness deposes to its being as large as a pomegranate, or mandarin orange; and the 9th witness says it is larger at one end than another,—larger than a fowl's egg. It is therefore not surprising that this suit should have originated, if the parties consider that they are joint proprietors of the land, where this unusual gem has been discovered, and are equally entitled to share in its value; but at present the court cannot decide on the respective rights of the parties. The spot where the gem was found is not clearly pointed out, nor are the rights of the parties to such portion of the field, well ascertained. For instance, it seems the Mallaka and Gamegey families hold in tatto-maroo, but the plaintiff and first defendant are of the Mallaka family, and the second and third defendants are of the Gamegey family. Again, the old suits are between two of the Mallaka family. The tenure in tatto-maroo, moreover, gives only the right to cultivate the soil, and where separate portions are held in turn by parties in tatto-maroo, it is usually owing to one portion being of larger extent, or more productive than the other. Presuming, however, that the parties are joint proprietors of the land, and hold in tatto-maroo, there is no proof of their right to gems found in the soil, having been transferred to each other by any notarial writing, or agreement between them. Moreover, it is stated at the bar, that it can be shewn into whose hands this large gem passed; if so, such persons (in whatever station they may be)

"Supreme Court Minutes," 1852. — can be examined as witnesses. And the rule of evidence also is that "*omnia presumuntur in odium spoliatoris*," and where a person of humble life found a large gem, and gave it to a jeweller, who refused to deliver it back, or to produce it, the jury were told to presume, and give the value of a gem of the highest value of that size. *Armory* v. *Delamerie*, 1 Str. 505.

As to the *royalty*, it will be time enough to decide that right when Government comes forward to assert such a claim.

"Supreme Court Minutes," 1853. — April 9.

D. C., Colombo, No. 14,838. } *Tieris* v. *Pamel.*

Per Curiam.—Defendant's petition of appeal cannot be received, unless he be allowed to appeal as a pauper in due course, when it may still be admitted.

It has been decided in a collective case at the second General Sessions of 1880 that a petition of appeal by a pauper cannot be entertained before the petitioner has made application to appeal *in forma pauperis*, which must be received and decided upon in the same way as those to sue or defend. Although a party may have a good ground to institute or defend an action as a pauper in the district court, it does not follow that he has a good cause for appeal, and the court ought to be satisfied thereof by the report of some other proctor than the one who has acted for the pauper, who might possibly favour an appeal for the mere chance of getting costs.

May 23.

D. C., Colombo, No. 12,503. } *Koster* v. *Drieberg.*

This was an action for declaration of title to certain immovable property, which the defendant, as executor of Mrs. Muller, claimed.

It appeared that plaintiff, having mortgaged the property in question to one Mrs. Groos in 1826 left Colombo in 1830. In 1831 his surety under the bond, Muller (the husband of Mrs. Muller), paid the debt to Mrs. Groos and took possession of the title deeds of the property and of the property itself. He died in possession in 1839, having appointed his widow his executrix. He died in 1846, making defendant her executor. On defendant advertising the property for sale, plaintiff raised this action.

Defendant pleaded prescription.

The District Judge found for defendant.

"Supreme Court Minutes," 1853.

On appeal, *Dias* for plaintiff appellant, *Morgan* for defendant respondent, the Supreme Court affirmed the decree of the court below.

The following is the judgment of the court :—

Oliphant, C. J. and Stark, J :—Libel states that plaintiff is the owner and possessed of the premises, that defendant as executor of Mrs. Muller did in 1848 advertize premises to be sold and prays that premises be declared to be his.

Answer states that testatrix was the owner and possessed of the premises until her death, when defendant entered as executor and claims prescription in testatrix.

Replication states that testatrix was never owner of the premises and as such never possessed them and plaintiff says premises are his by purchase and he mortgaged them 1826 to Mrs. Groos for fifty two pounds and ten shillings and the husband of the testatrix was his security in the mortgage bond. That in January 1831, the said husband as such security paid the debt. That about this time plaintiff went to Jaffna leaving his family in the care of testatrix and husband, and in consideration thereof and on account of the interest of the money paid by the husband, plaintiff permitted him to possess the premises till plaintiff should have repaid the debt, which he is now ready to pay to the executor, that after the husband's death the testatrix continued in possession but not quiet nor uninterrupted nor by a title adverse and independent of the plaintiff and therefore there there is no prescription.

Rejoinder states that title was adverse and independent &c., and therefore that there is prescription.

Defendant is examined.—Testratrix was mother-in-law of plaintiff. I advertized the house for sale, hence this suit. Admits the deed of sale marked A to Koster of the premises in question by one De Neys in 1825—also the bond marked B dated 9th December 1826 from Koster to Mrs. Groos for £52 10*s*. for which Muller and Reneaux are securities in solidum—admits also document C which is a pass dated 17th April 1830 signed by the Colonial Secretary for Koster to go to the Malabar coast.

Muller died in 1839 and appointed his widow his executrix. He left two daughters, Mrs. Koster and Mrs. Reneaux.

Testratrix possessed the property under the will during her life. The release marked G is from Reneaux and wife to the testatrix of Mrs. Reneaux's paternal share of inheritance, in consideration of having made over to them premises in the Main street Pettah, but which seemed to be four times as extensive as the premises mortgaged and therefore not the premises in dispute.

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In 1839 execution was issued from Jaffna against Koster's property and the premises were seized. This the testatrix opposed by letter F in which the premises are claimed by Mrs. Koster as belonging to the estate of her husband, she obtained injunction to stay sale, and instituted the case No. 39,309 against the creditor who issued the writ, who was a widow woman at Jaffna and judgment was given in favor of Mr. Muller in default in April 1844. Testatrix died October 1846, this action instituted 7th June 1850.

Plaintiff examined.—In 1830 left Colombo, put his wife and children under Muller's care, returned to Colombo 1850. We parted in bad terms, when I left in 1830, I left the house in charge of Muller, he to receive the rents paying certain interest, to give the rest to my family, this was verbal, Reneaux alone present. Whilst I was absent, I received nothing on account of the house nor any acknowledgment of title. I owed Mrs. Schondorft about £43 for board, Mrs. Schondorft re-issued her writ against me after I returned to Colombo in 1831. Muller redeemed the mortgage at my request. I did not pay him nor did he give me the title deeds I found them in a box &c.

Reneaux says—Koster left the house in charge of Muller telling him to pay the interest out of the rents and give the rest to his family. Plaintiff told Muller to redeem the mortgage if he could, and said he said he would. Then he admits that he swore that the house in dispute belonged to Muller in certain proceedings undermentioned. Mr. Stork produces edictile citation in May 1834 and application for certificate of quiet possession and certificate was granted in January 1835.

In the matter of proving the will of Mrs. Muller, Reneaux opposes and states that the premises in question belonged to the joint estate of Muller and his wife and applied for an injunction to prevent the sale of them and swore to the truth of the application (after this, Reneaux's evidence must be deemed worthless) and the plaintiff's admission that he was on bad terms with Muller at the time that he left for Jaffna is very unfavorable to his story as to his leaving the house in charge of his father-in-law and making a verbal arrangement at which Reneaux alone was present as to how the father-in-law was to apply the rent.

The only act done by Muller from which acknowledgment of plaintiff's title could be inferred is his having paid off the mortgage in question but inasmuch as he was personally responsible as security, he might have done so only to divert himself of responsibility to the mortgagee. He took no transfer, there is simply a receipt endorsed on the bond and all his subse-

quent acts are clearly adverse to the plaintiff's claim and asserting title in himself. "Supreme Court Minutes," 1853.

CARR, J., (*dissenting*)—I am of opinion that prescriptive possession has not been acquired by the defendant.

The words of the Ordinance in defining the requisite *possession* are, if possession was accompanied by payment &c. "or by "*any other act* by the possessor, from which an acknowledgment "of *a right existing in another person* would fairly and naturally "be inferred."

Now the facts of the case, so far as they bear upon the point in question, are these.

The property was purchased by the plaintiff Koster, his title deed of date 9th November 1825 being filed of record with his possession of titles, and was mortgaged by him to Mrs. Groos 9th December 1826; at that date, Koster was *undoubted owner*. He also continued to be so and at some subsequent time (but the date is not specified), on the hypothecation of the titles to Hesse, 28th May 1827, he declared himself the proprietor, and consented to Mrs. Thielman mortgaging the same and borrowing the sum therein mentioned. On the back of the deed which contains this declaration and consent to on the part of Koster, is the payment by the defendant Muller to Hesse of the principal sum in the bond and the interest from 28th February 1830 to 22nd January 1831, *the date of the receipt.*

In April 1830 Koster went off to Jaffna, leaving his wife and children in Colombo where the property is situated, "quite unprotected," according to the statement of the Mullers in their joint will of 2nd June 1836, but according to Koster's statement, when examined as plaintiff in the district court, "*under the protection*" of Muller who was the wife's father, with whom, Koster further says, he left the house in charge by a verbal arrangement, to receive the rent, and after paying certain interest to give the rest to the family.

There is reason to believe therefore that at his leaving Colombo in 1830 and up to 22nd January 1831, the date of Muller's payment of the bond, Koster was still *acknowledged owner* and in the constructive possession of the premises, and he gives an account of the origin of Muller's possession which is perfectly credible, and at this stage at least, is uncontradicted.

But now follow acts on the part of Muller to set up a title in himself.

On the 31st May 1834 Muller appeared before the district court for an edictile citation and certificate of quiet possession, and in his application he stated that he was in the *exclusive and*

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uninterrupted possession of the property and had been so for *about six years,* the word six being written over *nine* which is erased; and that the same was his *purchased porperty,* no date or deed of purchase however being specified or referred to nor any averment of *boná fides.* The value of the property is also stated at an inconsiderable sum by Muller in his proxy to Drieberg at this time with £30, though the same property had been valued by the Surveyor General's Department in 1825 at double that amount, and was bought by Koster that year at £67 10*s.*

Muller's ground of claim was alleged *purchaser* : But in 1839, when the property was seized by the fiscal, Mrs. Muller, then widow of Muller, wrote the fiscal claiming the house as belonging to the estate of her deceased husband "whose title "(she adds) is a *certificate* of the late Provincial Court of "Colombo and long possession." And yet again on 17th December 1840, when she applied for injunction to stay the sale of the property, she claimed the house as her late husband's "as the "deponent verily believeth *by purchase*" and set forth a joint possession of herself and her husband for a period of about 12 years.

Moreover in her proxy to Drieberg to remove the fiscal's seizure 8th July 1848, this same property which had been stated by Muller at half its real value, Mrs. Muller now when a title is supposed established in her states, is worth £300, which is double the value stated by Koster in his libel in the present action.

Koster returned to Colombo in 1850; and the present action was raised 7th June that year.

On the whole, therefore, I find in the circumstances of the case, a total want of *boná fides* on the part of Muller, and acts done by him and his widow from which on the circumstances an acknowledgment of a right existing in another person may fairly and naturally be inferred, which according to the Ordinance precludes prescriptive possession.

Sep. 13.

D. C., Galle, No. 15,092. } *Dammadase* v. *Sobita.*

Action to restrain defendant from officiating in a certain temple. It appeared that one Dona Jebona gifted the land in 1816 "for the purpose of enjoying the produce thereof as Sangite (common property) by all priests resorting there from the four cardinal points and under the superiority of Goddegamma

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Buddhe Rakkitte Teroonanse," who in 1833 built a temple thereon, and officiated therein till his death, he being of the Siamese sect. Both plaintiff and defendant were his pupils, but the latter though ordained as of his master's sect went over about two years before action was brought to the Amerapoora sect. Much evidence was taken as to the fact of pupilage of the parties and the court pronounced the following judgment :—

"I am of opinion that the plaintiff has no standing in court, and that there is nothing whatever to justify this court in granting the prayer of the libel.

It is unnecessary to enter into the question which has been raised as to whether a priest seceding from the Siam to the Amerapoora sect would thereby forfeit his right to the incumbency of a temple wherein religious rites were celebrated according to the Siam sect. This does not come legitimately before the court looks at the deed upon which plaintiff founds his right and finds no mention whatever made therein of any temple. It appears to be simply a gift of a certain garden in favor of priests from all quarters of the globe with a view to their enjoying the produce of the fruit bearing trees standing thereon.

According to the clear and manifest intention of the donor, such was to be the application of the produce and the priest appointed to take charge of the garden, I consider to have been so appointed simply in the light of a superintendent.

The prayer of the libel if granted would appear to be directly opposed to the spirit and intention of the donor. As far as I understand, that intention was to devote this garden for the refreshment of all priests who might choose to resort thereto, and to adjudge a controul over the property in favor of one sect to the exclusion of another would be, as I conceive, to defeat the clear intention of the donor.

The building has been put up since that gift was made, and there is nothing before the court to justify it in decreeing that the plaintiff has acquired a prescriptive right thereto.

The plaintiff is accordingly non-suited, parties bearing their own costs."

The plaintiff appealed against the judgment.

W. Morgan for appellant, *R. Morgan* for respondant.

The Supreme Court delivered the following judgment.

Set aside with costs, and it is decreed that the plaintiff being of the Siam sect, and pupil of the late Goddegamma Buddhe Rakkitte Teroonanse, is entitled to succeed to his right as superior of the temple and *pansala* in question with the lands belonging thereto,—and he is accordingly decreed to be quieted

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in the possession thereof and the defendant must pay the costs of this suit. The Supreme Court is of opinion that under the deed of donation filed, the priests of the Siam sect only were entitled to enjoy the premises, and that it would be "contra formam doni" for priests of Amerapoora sect to hold the same. Whatever right therefore the defendant might have had as a pupil of the late Goddegamma Buddhe Rakkitte Teroonanse he forfeited it by seceding from the Siam to the Amerapoora sect, and the plaintiff succeeded thereto, as his pupil of the Siam sect.

Oct. 21. D. C. Ratnapura, No. 6,508. } *Pattale* v. *Kankanewe.*

Per Curiam :—Set aside for irregularity. A district court has no power to grant injunction unless after libel delivered to the secretary of the court, which rule appears not to have been complied with in this case. The judge appears to have received the libel himself in chambers and to have granted an injunction before the libel was duly filed.

Oct. 29. D. C., Mannar, No. 4,824. } *Mironde* v. *Markoe.*

In an action on a bond which carried "two per cent" without more, the district judge decreed two per cent *per mensem.*

On appeal, *per Curiam* :—The Supreme Court concurs with the judgment of the district court on the merits of the case. But as the bond specifies that the interest is to be at the rate of two per cent without adding whether per mensem or annum, the court cannot intend on this patent ambiguity either one or the other. The judgment is therefore altered into "that the defendant do pay to the plaintiff the sum of £6 with the legal interest due thereon, viz., nine per cent."

Oct. 29. D.C., Matura, No. 17,581. } *Dondricko* v. *Siman.*

Per Curiam :—Set aside and a new trial had. This is a question between a Mayoraal and a Vidahn Aratchy as to their relative rights in the *Huwanderam* perquisites—and it appears from the evidence, that in villages where there is a Vidahn

Aratchy as well as a Mayoraal, the *Huwanderam* perquisite divides in different proportions between them. In the village in question however, there has been till lately a Mayoraal only, *and he has drawn the whole.* This circumstance which is the ground of the decree of the district court does not settle the point in dispute, in-as-much as, 1st, it does not determine whether the appointment of the 1st defendant as Vidahn Aratchy had the effect of bestowing the right upon him to such officer's share of the perquisite, and 2ndly, it does not appear that the plaintiff as Mayoraal performed the duties of Vidahn Aratchy entitling him to the whole, for otherwise his exaction of the Vidahn Aratchy's share may, to that extent, be a local usurpation on the part of the plaintiff.

D. C., Kandy, No. 6,321. } *Queen* v. *Kistnappa Nayakar.* Nov. 8.

The information charged the prisoner with having entered the Kandyan Provinces without a written permission for that purpose, he being a relation by affinity of the late Rajah Sri Wickrame Rajah Singha. 2nd count—that he being a male person of the Malabar caste, who was expelled from the Kandyan Provinces in 1815, unlawfully returned thereto without a written permission.

The charge was laid under the (3rd sec. of the proclamation of 2nd March 1818.)

After hearing evidence, the district court gave the following judgment:—

" The prisoner stands charged under the provisions of the 3rd section of the proclamation of the 2nd March 1815, which still continues in force. It declares " That all male persons being, or pretending to be relations of the late Rajah Sri Wickrame Rajah Singha either by affinity or blood, and whether in the ascending, descending or collateral line, are hereby declared enemies to the Government of the Kandyan Provinces and excluded and prohibited from entering those Provinces on any pretence whatever, without a written permission for that purpose by the authority of the British Government under the pains and penalties of martial law, which is hereby declared to be in force for that purpose, and all male persons of the Malabar caste now expelled from the said provinces are under the same penalties prohibited from returning except with the permission being mentioned." By the charter of the 18th February 1833, abolishing all subordinate courts then existing within the colony, *exclu-*

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sive jurisdiction in all criminal matters, save certain exceptions, is under the 4th and 25th sections, vested under the district court, which has therefore succeeded to all the functions, whether judicial or otherwise, previously exercised by all other courts both in the maritime and central provinces of this island. Now under this proclamation the offence with which the prisoner is charged being declared criminal, this court is consequently, in its opinion, to all intents and purposes, fully competent to entertain the case.

"The charge is, not only by the evidence adduced for the prosecution, but by the prisoner's own admission, fully proved.

"It is ordered that the prisoner do enter into recognizances himself in £100, and two sureties in £50 each, to quit the Kandyan Provinces forthwith—in default to be imprisoned, such imprisonment not to exceed twelve calender months on the whole."

Against this judgment an appeal was taken. *Morgan* for appellant, and the *D. Q. A.* for respondent.

The court delivered the following judgment :—

On the 2nd March 1845, a proclamation was issued by the Governor proclaiming that it was agreed and established by the said Governor, acting on the part of his sovereign on the one part, and the Adigars, Dissaves and other principal chiefs of the Kandyan Provinces on behalf of the inhabitants on the other, amongst other things by cl. 3.

"That all male persons being or pretending to be relations of the late Rajah Sri Wickrame Rajah Singha either by affinity or blood, and whether in the ascending, descending or collateral line, are hereby declared enemies to the Government of the Kandyan Provinces and excluded and prohibited from entering those provinces on any pretence whatever without a written permission for that purpose by the authority of the British Government, under the pains and penalties of martial law which is hereby declared to be in force for that purpose, and all male persons of the Malabar caste now expelled from the said provinces are under the same penalties prohibited from returning except with the permission before mentioned."

But no court is specified where persons offending against the said 3rd clause are to be tried, but as the infliction of the pains and penalties of martial law is the punishment provided, and as it has not been shewn that any court has the power of inflicting such pains and penalties, the Supreme Court concludes that offending parties were to be tried by some proceeding under martial law. The Charter of 1833 recites the courts existing at its date which were by the said charter abolished, but necessarily makes no mention of courts martial which could

not thereby be abolished, as they are continued from year to year by Acts of Parliament—neither has it been shown that any court named in the charter, and to which the district courts succeeded by the charter, had power to inflict the pains and penalties of martial law. "Supreme Court Minutes," 1853. —

2.—Neither by the charter nor by any ordinance is power given to district courts to inflict the pains and penalties of martial law.

3.—There is no evidence to establish the second count whatever and the proof does not sustain the allegation on the first count that defendant is related by affinity to the late King.

Conviction and sentence set aside.

D. C., Kandy, No. 21,663. } *Selby* v. *Fernando*. Dec. 3.

Per Curiam,—The order of the district court is affirmed with costs. The defendant is in gaol under an execution issued in this case for the payment of a crown debt, and he seeks to obtain his discharge therefrom under the provisions of the Insolvent Ordinance No. 6 of 1835. His counsel (Mr. Adv. Richard Morgan) has raised two points for the consideration of the court. 1st.—That the defendant is entitled to be discharged under the Insolvent Act from this execution for the crown's debt. 2nd.—That if he is not so entitled to be released from such execution, he can nevertheless apply in this suit, to take the benefit of the Insolvent Ordinance against the claims of other creditors.

On the first point the court considers, that the crown not being expressly named in the Insolvent Ordinance, is not bound thereby, although it may (if it think fit) avail itself of the provisions of that Ordinance, and a previous collective decision has been cited in support of this view. The court decides accordingly that the defendant is not entitled to be discharged from this execution for the crown's debt under the Insolvent Ordinance.

On the second point, it seems clear that the proceedings contemplated by that Ordinance are for the release of prisoners confined for any debt, from which they can be discharged, or take the benefit of the Ordinance; as the 41st clause declares that "the prisoner shall be immediately discharged from custody, " and shall be no more liable to arrest for the debt for which " he or she shall have been so in execution." The court must conform to the Ordinance in this respect, and cannot grant a

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discharge in any other form, or qualified manner, as save and excepting certain debts specified therein. The present proceedings moreover can never be viewed as wholly separate and distinct from the original suit of the crown, as contended for, because the application made by the defendant is for his discharge from the execution in that suit, and the district court thereon is called upon to make an order for that purpose, which this court considers it ought not to be in this case any more, than if it were applied to, to make such order on any proceeding wherein the prisoner was in custody for not paying any fine, penalty, forfeiture or recognizance under the Fine Ordinance No. 11 of 1844 or on any criminal process, from which they could not be discharged under the Insolvent Ordinance.

It does not appear that the defendant is also detained in execution at the suit of any private creditors, but if he was so, there is nothing to preclude him from obtaining now the benefit of the Insolvent Ordinance in any such suit, as it would not extend to the debt of the crown, which being no party thereto could not be affected by such proceedings, even if the crown's debt were named in the statement of debts by the prisoner.

Dec. 23.

D. C., Colombo, No. 1,046. } In re *Warren* deceased. *O'Halloran* v. *Reyne* and others.

Per Curiam:—The order of the district court is set aside, and the administration granted to Mr. O'Halloran is revoked without costs.

The deceased Captain Warren was the paymaster of the Ceylon Rifle Regiment and died in Colombo on the 23rd December 1851, and administration of his estate was applied for on the 29th December 1851 by Mr. O'Halloran and granted to him on the 13th January 1852 under the 7th Rule of the *General Rules and Orders of Court*, which authorizes the district court to grant administration to the Secretary of the Court, or suchother person as the District Judge shall appoint, when there is no will nor widow nor next of kin appearing on citation; and Mr. O'Halloran was properly selected, for the reasons stated by the district judge, to act as administrator under such circumstances in the colony, provided that the court did not in such grant of administration to him not being the heir or next of kin, contravene the provisions of the Act of Parliament of the 6th Geo. IV. c. 61 which after reciting previous acts, and that the transmission to regimental agents of the effects of officers and soldiers

dying in service had been found highly beneficial in securing an early distribution of such effects amongst the relations at small expense, and many sums were thereby saved to the relations which would otherwise be from their small amount wholly lost, and that it was expedient to render the provisions relating to such matters more effectual. It was thereby enacted that all officers and persons authorized under the articles of war are to take care of or collect the effects of officers or soldiers dying in service out of the United Kingdom, and to ask, demand, and receive the same, and commence actions and suits for the recovery thereof without taking out letters of administration in like manner and in every respect, as if they had been appointed executors or had taken out letters of administration of such effects; and no registrar of any court in the East Indies or in any colony shall in any manner interpose in relation to any such effects, unless required or authorized so to do by any such officer or persons under the provisions of the act. By the 2nd clause of the act also, effects remitted are not to be deemed assets so as to render administration necessary unless there be other effects of the deceased in the province which require it.

By the 30th article of sec. 1 of the articles of war, when any officer shall die in the service, the major of the regiment shall immediately secure all the effects of the deceased within the colony, and shall within one month after the death of the officer, with the assistance of two other officers not under the rank of captain to be appointed by the commanding officer of the regiment, make any inventory thereof, and after payment of the regimental debts and quarters, place the balance in the hands of the paymaster to be by him paid to the heirs or legal representatives of such deceased officer, if present at head quarters, upon the production however, if the amount be £50 or upwards, of the probate of the will, or of letters of administration; and a report thereof, with a copy of the inventory and an account of the debts and credits, shall be sent to the secretary at war, and if there be no heir present, then the inventory and the said account shall be sent to the secretary at war, and the paymaster shall credit the balance in the next regimental pay list. It appears to us that the provisions of the act were fully intended to exclude official administrators from interposing, unless required as above. And the court can under our rules regard the appointment of Mr. O'Halloran as administrator instead of the secretary of the court in no other light. Moreover, if any letters of administration in this colony were required to be granted by the district court, they should have been limited to demand and receive over the balance in the hands of the pay-

"Supreme Court Minutes," 1853.

master and to administor the same, and pay the remaining debts of the deceased; and if letters of administration were not required to be granted here, then a considerable expense would be saved to the estate in repect of the costs for stamps, appraisement, inventory, collection and remittance of the effects by conforming to the provisions of the act. Upon these grounds, the Supreme Court considers that the letters of administration have been improperly granted to Mr. O'Halloran and must be revoked as being contrary to the provisions of the Act of Parliament and the articles of war; but it does so reluctantly, looking to the peculiar circumstances of Mr. O'Halloran's position, who appears to have acted throughout from friendly motives towards the deceased, and to have incurred considerable expense and trouble in this grant of administration to him. Whilst on the other hand, the appellants appear to have been very remiss (as they possessed full power under the Act of Parliament to demand, sue for, and recover the effects of the deceased) in not taking any step to urge their claim against this administration until ten month after his death. Nor has it ever been shewn in these proceedings what was the date of their appointment by Lt. Col. Braybrooke, or that they had done anything to secure the effects of the deceased, or made any inventory thereof as required.

Dec. 23.

The Queen v. *Abe* and another.

The prisoners in this case were convicted of arson, but sentence was reserved pending the consideration by the collective court of the question to what punishment the prisoners were liable under cl. 3 of the Ordinance No. 6 of 1846.

The Queen's Advocate for the crown was heard.

Per Curiam: (Starke, J., *dubitante*):—

The sentence on the prisoners must under the Ordinance include corporal punishment with transportation or imprisonment.

Starke, J.,—I consider that where an Ordinance declares that a party guilty of an offence shall be liable to two or more punishments named, such liability is in the nature of a maximum of punishment, and it is in the discretion of the court according to the circumstances of the case, to award one of the punishments only; and that an award of both, or all the punishments in all cases, is not imperative, and would it was conceived be against the object and purpose of the provisions of the due distribution of punishment according to the nature of the crime or offence.

"Supreme Court Minutes," 1854.

C. R., Point Pedroe, No. 1,269. } *Alwar* v. *Valiuppen*.

Feb. 6.

Per Curiam,—The petition of appeal must be rejected as by the 12th cl. of the Ordinance No. 19 of 1852, the required stamps cannot be annexed to it. And the order of the Supreme Court of the 18th day of October 1853 must be cancelled quia improvide emanavit. The petitions presented are not good useful or available in law or equity under the 5th clause of the above Ordinance, owing to their not being duly stamped and the court has no power to grant to any party the indulgence of filing a fresh petition after the time prescribed by the ordinance has elapsed.

D. C., Galle, No. 15,977 } *Meera Lebbe* v. *Sinne Lebbe*.

May 12.

Per Curiam,—It is very desirable in all cases where boundaries of land are in dispute between the parties, that they should acquiesce in having a joint survey made in the presence of the parties and their respective witnesses, but the court cannot compel an unwilling party to join in any such survey or commission.

D. C., Ratnapoora, No. 6,436. } *Kande* v. *Kiry Naide* and another.

June 3.

Per Curiam,—The decree of the district court is set aside and the case remanded back to be proceeded with and judgment to be given *de novo*. The costs are to abide the result.

Although a priest, if he has lay brothers and sisters, can have no claim to his father's land, but by special gift or bequest, yet if he be the only child, the Supreme Court has held that he has a right to inherit his father's lands in preference to collateral heirs. The rule is not general that a priest cannot acquire or inherit land, and that to take the robe is to resign all worldly wealth, as has been stated, because a priest may at all times acquire land from any one by gift, bequest or purchase, and may inherit his brother's or sister's estate.

"Supreme Court Minutes," 1845.

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June 21.

D. C., Jaffna, No. 6,123. } *Ramalinger* v. *Cadiramer*

Per Curiam,—The decree of the district court is set aside with costs and the case remanded back to be proceeded with.

The plaintiff states in his libel that his late father erected the temple, that he succeeded him as priest and prays to be restored to the office of priest. This the first defendant denies in his answer and alleges that he is owner of the temple which the plaintiff denies in the replication. The principal question therefore in issue is whether plaintiff or defendant is owner of the temple and the plaintiff should first call evidence.

June 29.

D. C., Kandy, No. 25,990. } *Parson* v. *Selby*.

This was a case of libel between two members of an institution called *the Ceylon lCub*. Selby, the defendant, affixed to the walls of that club a placard in which he declared that Parsons (the plaintiff) was a liar. Thereupon the committee of the club, at the instance of Parsons, called upon Selby to explain his conduct. He replied as follows :—

"I accuse Parsons of being a liar, in having denied that he was present when a certain letter which appeared in the *Colombo Observer* signed X Y Z was written, and in having stated that he was not fully aware of the contents of that letter, until he saw it in the said newspaper, whereas, in truth and fact, he was present when the said letter was written and was fully cognizant of its contents."

At the close of the enquiry which followed this letter, the committee were unable to arrive at a decision.

Parsons now came into court and based his action for damages upon the above letter.

Defendant pleaded (1) not guilty, (2) justification, in that he had written the letter in question only in reply to the secretary of the committee, and (3) truth, viz that plaintiff is a liar.

The learned district judge found that plaintiff and defendant were equally concerned in the writing and publishing of the letter signed X Y Z, and that plaintiff was wrong in denying the part he had taken in the transaction. The district judge non-suited plaintiff with costs.

On appeal, the Supreme Court (CARR, C. J. and TEMPLE, J.) set aside the decree of the court below and entered judgment for plaintiff to recover from the defendant one pound sterling as damages and his costs in the district court, but each party to bear their own costs of appeal. "Supreme Court Minutes." 1854.

The Supreme Court considers that the defendant has failed to prove that the defendant's letter to the secretary of the Kandy Club was a privileged communication, the defendant having originated the statement repeated in that letter which formed the ground of this action; see *Smith* v. *Mathews*, 1 M. Rob. 151 and *Griffiths* v. *Lewis*, 7 Q. B. 61, and without entering upon the question whether truth has been proved or not, which this court would have some difficulty in deciding upon the conflicting evidence adduced, the Supreme Court considers that the defendant could not in this case, arising as it does in Kandy, justify the publication on which the action is brought, upon the ground of bare truth, as the court must also look to see whether the publication was warranted by the occasion and the mode and circumstances; which in its view it certainly was not.

D. C., Trincomalee, No. 7,725. } *Rawooter* v. *Nethersahib*. June 29.

Per Curiam:—If a party is improperly allowed to sue as a pauper, he gains thereby an undue advantage in the suit over the opposite party, and the court is bound to guard against the same; any proctor therefore selected to report on a pauper having a cause of action, should always be independent of the suit, and never be liable to favor the application in the hopes of having the conduct of the pauper's case.

Wherever therefore the same proctor is subsequently retained by the pauper on the application being allowed, the court should on the motion of the opposite party refer it to another proctor to report whether the pauper has a good cause of action or not in the suit.

D. C., Kandy, No. 23,466. } *Muttu* v. *Menika*. June 29.

Per Curiam,—When prescription once begins to run, it continues to do so, notwithstanding any subsequent disability, so that on the death of a person in whose life, the time first began to run, his heir must enter within the residue of the ten years, although he laboured under a disability at the death of his ancestor. *Cotterell* v. *Dutton*, 4 Taunton 826, and 1 Chitty Gen. Prac. 754.

"Supreme Court Minutes," 1854.

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July 5.

D. C., Galle, No. 15,779. *Tamby Saibu* v. *De Silva.*

This case was remanded for a new trial in these terms:—

The Supreme Court considers that plaintiff did begin, but rested his case upon the admissions of the defendant in the answer and examination and the written documents adduced.

The receipt, being only a *prima facie* acknowledgment that the money was paid, was liable to be contradicted and explained. *Graves* v. *Key*, 3 B. and Ad. 318. And the defendant having adduced evidence for that purpose, the plaintiff was clearly entitled to call evidence to rebut the same without defendant's having a right to reply.

July 5.

D. C., Badulla, No. 14,311. *Menika* v. *Kiri Banda.*

Per Guriam,—Plaintiff is entitled to recover one half of her father's lands, as being the only child by his first marriage, although given out in deega by him, and the other half of the father's lands devolves on the children by his second marriage. The above rule of inheritence has been acted on in several cases, following a collective decision on the point. D. C. Kandy, No. 20,898. D. C. Matale, No. 3,574. D. C. Kandy North, No. 1,333.

July 19.

D. C., Kurunegala, No. 12,911. *Medankara Unanse* v. *Ilahgomua Unanse.*

Per Curiam (Carr, C. J. and Temple, J.) :—

It has been urged by the appellant's counsel that the defendant (appt.) had upon the evidence a prescriptive title to the temple in dispute from adverse possession thereof by his preceptor and himself for 10 years previous to the bringing of this case,—which was a new action and not a continuance of the former one—but the decisions of this court mentioned in Sir Charles Marshall's Digest, tit ***Prescription***, para. 3 and 9, shew that the possession required by the Ordinance must be undisturbed and uninterrupted and by adverse title, viz "unaccompanied by payment of rent or produce or performance of service or duty or by any other act by the possessor from which an acknowledgment of a right existing in another person would

fairly and naturally be inferred." And this court has accordingly held, where the possession under which a party claims a prescriptive title has ineffectively been "contested," that this contest would nevertheless be an interruption or disturbance to defeat the claim of prescription. Thus a claim before, and award by, a gansabawe, which was not submitted to, or the commencement of an action in the usual way have been held sufficient to bar a title by prescription. The case of *Smith* v. *Bowzer*, 3 T. R. 662 and 3 Burge 23, have been cited for the appellant, and an actual entry also would be necessary to disturb the possession and to prevent the operation of the Statute of Limitation. Dougl. 485, n. 1 and 1 Saund. 319 e. But this court under the Roman Dutch law adheres to the former decisions, as constructive or civil interruption is effected by *litis contestatio* or by *vocatio in jus*, and even by a complaint or protestation duly made, when on account of the absence of the adversary *a litis contestatio* cannot be interposed. 3 Burge 24, 25. 26. Voet lib. 41, tit. 3, n. 19, 20, 21. And it is essential to a title by prescription that the party claiming should have for ten years previous to the bringing of the action held the peaceable and continued possession without any interruption by the true owner, without any acknowledgment by him in possession of that person being the owner, and without any suit having been instituted against him. 3 Burge 26, Voet 33. 3. 9.

"Supreme Court Minutes," 1854.

D. C., Badulla, No. 14,253. *Raterale Unanse* v. *Coomboore Appu.* July 31.

The Supreme Court is of opinion that the deed from plaintiff to defendant dated 19th September 1846 is revocable according to Kandyan law, by which "all deeds of gift whether conditional or unconditional are revocable by the donor in his life time."

Marshall 320. *Armour* 179.
Kandy, Nos. 22,404 and 21,344—25th March, 1850.
Kandy, No. 23,886—12th September, 1851.
Matale, No. 4,271—20th August, 1844.
Kandy, No. 24,318—31st July, 1854.

"Supreme Court Minutes," 1854.

Augt. 31. D. C., Colombo, No. 1,056. In re *George Adrian Perera*, deceased.

CARR, C. J.,—The application is rejected. The secretary is not authorized to file an application for administration as is required, when the next of kin apply for the same. The course which the secretary should pursue is clearly laid down in the 7th clause of the rules of court, sect. 4 viz. to file an affidavit of death without any application whatever for administration. Upon the return to the citation and commission, if no next of kin appear, the court may then consider whether it will grant administration to the secretary or to any one else. This does not require the intervention of any proctor, and is the practice pursued in the district court of Colombo.

Nov. 7. D. C., Jaffna, No. 100/3,761 *Caderasen*, guardian of his minor children v. *Caderen* and another.

Per Curiam,—The interlocutory order of the district court is set aside without costs, with liberty to the plaintiffs to repeat their application should they see fit.

An infant who sues by a next friend is not liable for costs, nor can his property be seized in execution for their payment, because he cannot while under age disavow the suit. But if the infants, (the 2nd and 3rd plaintiff) have attained their majority, which does not appear, and have since thought proper to proceed in the cause they will then be liable for costs. The property however of the 1st plaintiff (the next friend) is liable *Beames* on *Costs*, p. 103 and 107.

Dec. 8. D. C., Matura, No. 18,321. *Siman* v. *Sinan*.

Per Curiam,—The principle of the law of intervention is that if any third party consider his interest will be affected by a cause which is depending, he is not bound to leave the care of his interest to either of the litigants, but has a right to intervene, or be made a party to the cause and take on himself the defence of his own rights, provided he does not disturb the order of the proceedings, nor stop the progress of the case. The intervenient may come in at any stage of the cause and even after judgment.

if an appeal can be allowed against such judgment. It is immaterial in what state the cause is in, if at the time of the intervention the proceedings are not deranged by it. *Members of Orphan Board* v. *VanReenen*, 1 Knapps Privy Council Reports p. 91-2. Chilaw No. 13,115 in appeal. *Voet*, 5, 1, 37. *Gail* p. 125.

D. C., Kandy, No. 27,660. } *Meeyapulle* v. *Soyza.*

This was an action on a pro. note. On plaintiff moving for provisional judgment, defendant denied receipt of the consideration in full. After examination of the defendant, the learned D. J. allowed plaintiff's motion.

On appeal, *per Curiam,*—

The order of the district court of Kandy of the 25th day of September 1854 is affirmed with costs. The Supreme Court infers from the examination that the wheat (for the value of which the note was granted) had been delivered to the defendant, but that they had not removed all the wheat at once, and that there was part still in the store to be removed by them. The defendant admit also a delivery of part. In *Collison & Co.* v. *Ekqteen*, Menzies R. p. 46, it was held that on a note given for the sale of goods a delivery of part was a sufficient consideration given by the plaintiffs to support the whole note, and the note was valid and binding on defendant, and that the mere fact of the failure of the plaintiffs to deliver a part of the goods without any liquid evidence instanter to prove that this non-delivery was a default of the plaintiffs, was not a defence against provisional sentence, which therefore the court gave with costs.

Application of *E. T. Gerlits* and *William Vanden Drieson* of Badulla Proctors.

On reading the petitions of E. T. Gerlits and William Vanden Drieson, and the letter of the district judge of Badulla, it is ordered that the certificates be granted to the said petitioners.

The petitioners are informed that under the 5th cl. of the Ordinance No. 12 of 1848 they are incapable of obtaining any taxations of any bill of costs due to them or of maintaining any action or suit for the recovery of any fee, reward or disbursement for or in respect of any business, matter or thing, done by them as proctors, whilst they shall have been without such certificates, and they are liable to be prosecuted by the Queen's Advocate for the fine therein named.

"Supreme Court Minutes," 1854.

Dec. 23.

D. C., Galle, No. 14,879. } *Don Nicholas* v. *Justina.*

Per Curiam.—The Supreme Court does not decide the case on the plea of *res judicata*, but on the merits. But by the Dutch law, persons other than the heirs who meddle with the property of a deceased person are not liable for more than their intromissions. See *Freyhaus* v. *Cramer*, Knapps R. 115 and *Herbert's Dutch Executor's Guide*, p. 118, and the court is of opinion that the defendant in this case is only liable to the extent of property or assets of the estate, that has come to her hands, or been possessed by her, and not duly paid over to the creditors having a right thereto. Nothing of the kind having been proved against her, the judgment is affirmed.

"Supreme Court Minutes," 1855.

Jany. 9.

C. R., Badulla, No. 1,902. } *Manikralle* v. *Dingiry Menika.*

Per Curiam,—If the proctor in the cause is a witness, he will generally be suffered to remain, his assistance being necessary to the proper conduct of the cause (*Pomeroy* v. *Baddeley*, R. and M. 430) ; but this is matter for the discretion of the judge.

Jany. 22.

D. C., Jaffna, No. 6,229. } *Sidemberanader* v. *Sidemberanader.*

Per Curiam,—The 7th clause of the rules dated 2nd July 1842, modified by the 4th clause of the rules of the 17th June 1844, empowers the district court to receive evidence on the part of a plaintiff on motions for judgment by default, which the Supreme Court has decided should always be required in cases where the title to land is in issue.

The Supreme Court further observes that by the 1st clause of the rules dated 2nd July 1842, a defendant in default of unswering is actually barred, and no rule is necessary for him to shew cause why he should not be barred. Being thus in default, the rule should rather be served on him to shew cause why judgment should not be given against him for his default.

D. C., Tangalle, No. 130. } *The Queen* v. *Dowan* and others.

"Supreme Court Minutes," 1855.

Jany. 30.

Per Curiam,—The conviction and sentence as respects the 1st prisoner is set aside. The district court has found that the 1st prisoner is only about seven or eight years old. Within the age of seven years, no infant can be guilty of felony, and between the age of seven and fourteen he is presumed to be innocent, unless this presumption is rebutted by strong evidence of mischievous discretion; and being concerned as he was with the two other prisoners, the Supreme Court presumes that he acted under their influence.

D. C., Matura, No. 7,387. } *Wellehinde* v. *Don Andris.*

The judgment of the court below was affirmed as to the conviction of the prisoner on the 2nd charge for receiving the bull knowing it to be stolen; and as to so much of the sentence as adjudged him to be imprisoned for the period of one year to hard labour; but the sentence was set aside as to the prisoner's receiving twenty lashes.

Per Curiam:—The practice of the Supreme Court for some years past is not to inflict corporal punishment, where the prisoner is acquitted of the first count for stealing cattle, and convicted only on the second count for receiving.

Although the offence is also very common in the Matura district and complaints thereof are numerous, the Chief Justice was assured by the late district judge Mr. Livera, who had great experience in the district and knowledge of the native evidence, that in most of the charges for cattle stealing, the witnesses were false, and that he would not rely on the evidence adduced. And the Chief Justice concurs in this opinion from his own knowledge of such cases in the Southern province, and thinks the evidence therein should be relied on with great caution.

P. C., Ratnapoora, No. 4,654. } *Pinna* v. *Kirry Binda.*

March 8.

Per Curiam,—Flogging with the rattan is not a legal punishment.

"Supreme Court Minutes," 1855.

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March 13.

D. C., Jaffna, No. 6,459. } *Merwin* v. *Copalo.*

The whole proceeding in execution since the death of the late defendant under the writ re-issued against him is quashed. Parties bearing their own costs thereof. The suit having become abated by the defendant's death, no further steps in execution could be taken, without first making the heirs or legal representatives of the deceased defendant, parties to the suit, when the writ should have been re-issued against them.

The minutes of all the proceedings in the case should be entered briefly and consecutively by the secretary of the court by themselves; and the written motions also filed separately and not be jumbled with the minutes thereof.

D. C., Manaar, No. 5,073. } In re *Wopoe Marcair,* deceased.

Per Curiam,—It is the wish of the widow that administration should not be granted to her, but to the appellant; she therefore waives her preferent right; and it is desirable to grant administration jointly to her and the appellant, because as a moorish woman, the widow would not appear or act in public, except through an agent.

March 20.

C. R., Batticaloe, No. 5,223. } *Armogam* v. *Attiar.*

Per Curiam,—The 20th clause of the Ordinance No. 14 of 1840 applies only to prosecutions under the ordinance and not to a civil action.

March 27.

C. R., Nuwera Eliya, No. 196. } *Keri Menika* v. *Ukkorale*

Per Curiam,—Although the 2nd defendant was absolved from the instance in the former suit No. 114, he can be again sued by the same party or by those in the same interest, upon the same subject matter.

An absolution from the instance of a defendant, is equivalent to the plaintiff being non-suited, and is no bar to a subsequent action between the same parties, which a dismissal of the case would be. "Supreme Court Minutes," 1855.

P. C., Nuwera Eliya, No. 2,827. } *Rang Manika* v. *Punchi Banda.* June 5.

Per Curiam,—Every man is liable under the 3rd clause of the Ordinance No. 4 of 1841, who being able wholly or in part, to maintain his family, leaves his wife or his child, legitimate or otherwise, without maintenance or support, whereby they shall become chargeable to, or require to be supported by, others; and there is no exception in the case of a beena marriage when they are thrown upon others for support. The defendant, moreover, may be found guilty as respects the child, although the complainant may fail to prove her liability to support herself.

P. C., Caltura, No. 13,712. } *Perera* v. *Fonseka.* June 14

Per Curiam,—The tolls by the Ordinance "shall be levied in respect of" the bridges and ferries specified therein, and if a person crosses or passes over any bridge or ferry, he is liable to pay the toll for it, and cannot be free from or evade the same by stopping at the toll collectors house at the other side of the river, and not passing though the bar placed there.

Some of the clauses in the Ordinance are taken from the English Turnpike Acts, in which the general provisions are different, as such Acts authorize the appointed toll collector to demand and take at the several toll gates and turnpikes, or side bars and claims, the tolls mentioned in the Acts before any horses, cattle or carriage whatsoever shall be permitted to pass through such toll gate.

"Supreme Court Minutes," 1855.

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July 3. D. C., Ratnapoora, No. 6,504. } *Kiry Menika* v. *Kiry Menika.*

Per Curiam,—The interlocutory order is affirmed. As the libel alleges damage of £60 done to the plaintiff by the defendant ousting him, and prays not to be restored to possession, but for such other relief as to the court shall seem meet, it is not merely a possessory action, but an action of trespass, to which the defendant may plead his title.

The possessory action is founded on the right under the Roman Dutch law of the person in possession of any property for more than a year and a day to hold the same until any one else has legally taken over the property in possession; and therefore as the Kandyan law is silent on to such right of possession, the Maritime law should be now the law for the determination of such matter or question in the Kandyan provinces under the 5th clause of the Ordinance No. 5 of 1852.

Augt. 18. D. C., Kalutara, No. 13,080. } *Marikar Lebbe* v. *Slema Lebbe.*

Per Curiam,—The plea of prescription must clearly be allowed in this case and the plaintiff's claim dismissed. The former suit having been filed within time is of no avail to the plaintiff in the present suit, which is a fresh action, and not a revival or continuance of the old one. Defendant also have made no admission in favour of the plaintiff's claim in the old suit.

Sep. 7. D. C., Matara, No. 334. } In re *Thomas Aratchy,* deceased.

Per Curiam.—Minors cannot consent to probate in common form. 1 William's *Exec.* 191, and the district court should appoint a guardian for them to litigate the will and enter a caveat for that purpose. The court is bound to protect the interests of minors and to require wills in this colony, where fraud is so prevalent amongst both relatives and executors, to be proved in solemn form, if the court doubts the validity of the instrument as a will, even though the consent of the parties may be seemingly given to the probate in common form. *In re* Tolcher, 3 Add. 17.

C. R., Chavakachcheri, No. 4,171. — *Casinader* v. *Morger*. — "Supreme Court Minutes," 1855. — Oct. 9.

Per Curiam,—An objection to the stamp must be made before the paper is read in evidence. *Fox* v. *Wagner*, 7 A. and E. 116.

D. C., Jaffna, No. 7,855. — In re *Deogopulle* and *wife Annama*, and their *son Nicholaspulle*, deceased. — Oct. 12.

Per Curiam,—The Supreme Court considers that the proceedings should be quashed in so far as administration has been granted to the estates of Deogopulle and his wife Annama, the father-in-law and mother of the applicant. But the grant of administration to the applicant to the estate of her husband is affirmed.

Administration can only be given to one estate under one grant of letters of administration, since it would lead to confusion to mix up together estates to which different people are interested in different degrees.

P. C., Chavakachcheri, No. 11,323. — *Armogam* v. *Sidemberenader*. — Nov. 6.

Per Curiam,—The Supreme Court considers that the complainants may be severally fined £1 each under the 12th clause of the Ordinance No. 11 of 1843; and that it would be contrary to the obvious intention of the legislature therein to hold them liable only to pay one fine of £1, as well as the reasonable expences of the witnesses.

It would also be inconsistent with the provision in the same clause for enforcing payment of the expences of the witnesses against "any party" and not "any party or parties" adjudged to pay the same, which shows their separate liability although several are concerned in the offence, each may be separately guilty for his own act or participation therein, as in libel or forgery; (*Cowp.* 612) and the clause has been introduced for the suppression of wrong and for the public good, but if the construction contended for by the defendant's counsel were to prevail, then the greater the number of offenders, the less would be the punishment.

“THE SUPREME COURT TUESDAY MINUTES.”

D. C., Galle, No. 11,864. } *Bastian* v. *Siman*. "Supreme Court Tuesday Minutes," 1846. Feb. 24.

Oliphant, C. J.,—In this case the plaintiffs complain that they have been ousted from their lands by the defendants. The fictitious action of ejectment is unknown to our law. Prior to its introduction in England, the remedy in a case of this nature was a writ of right. The pleadings were very simple, and the court sees no reason why they should be otherwise in the courts of this colony. The rule of court on the subject requires that the libel shall state the cause of action or complaint as shortly as the nature of the case will admit. The libel in the present case is obscure, involved, uncertain, and most unskilfully drawn. According to what we find in Blackstone's *Comm.* vol. 3, chap. 10, and in the appendix No. 5 and 6 in the same volume, the libel should have been drawn in the following fashion, allowing for certain differences in the law and practice of the mother country and the colony.

After setting forth the names of all the plaintiffs, duly assisted by their husbands and guardians by name, the libel might only have set forth the lands and premises, as set forth in the libel, that the plaintiffs were seized thereof as of fee and right by taking the rents, issues, produce and profits thereof; that on such a day they were ousted by the defendants; and further (to meet the local law) it should set forth that they have a title by prescription, (in the usual way.) The libel does not seem demurrable by reason of the Ordinance No. 21 of 1844. The defendant may plead that Ordinance in bar, as he would an Ordinance for the limitation of actions.

D. C., Chilaw, No. 13,115. } *Pelis* v. *Siman*. Feb. 24.

Oliphant, C. J.,—By the Roman Dutch law it should seem, 1st.—That a person wishing to intervene must obtain the leave of the court so to do, upon showing a probable interest. 2nd.—That an intervenient cannot set up a separate right, different from the plaintiffs or defendants. Voet 5, 1, 37 and 38. But it may be a question whether the 32nd rule of court does not admit of greater laxity in favor of intervention, upon which the judge will not give any opinion in the present case. The rule, however, does not appear to interfere with Roman Dutch law, which requires that the intervenient shall take up and go on with the suit in the stage in which he finds it when he comes

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into court. The Supreme Court, therefore, directs that the trial be set down for an early day, and that the intervenients (who before that time shall have been allowed by the district court to intervene) be allowed at the trial, if they think fit, to argue in any manner they please. By doing so, however, they will be bound by the judgment, because they have become parties, and they will observe they are too late to file a list of witnesses and documents, and so will be deprived of the advantage of evidence : such being the case, the intervenients will do wisely to withdraw from the suit by leave of the court, and so can bring their action at a future period, and they must pay all costs occasioned by their intervention in both courts.

May 12.

D.C., Kandy, No. 19,124. } *Murugappa* v. *Chritina.*

Carr, J.,—The Supreme Court has decided in a case reserved for collective decision, (Chilaw No. 4,416, 24th October 1838, see Morgan's *Digest* p. 252) that, by the settled practice here, an administrator is at liberty to alienate, and consequently to encumber the whole estate entrusted to him, the remedy for the heirs being against the administrator and his securities for malversation; and this court has subsequently refused, judicially sitting, to deviate from that established practice, many titles to estates being now dependent upon the validity of transfers thus made by administrators. The decree of the district court, moreover, appears to go the length that immoveable property of an intestate is not liable to be sold under an execution by a creditor, who has obtained judgment against the administratrix for a debt contracted by her in that capacity, because she had specially mortgaged the land as administratrix to the creditor for payment of that debt, which is clearly erroneous.

May 19.

C. R., Calpentyn, No. 2,066. } *Manuel* v. *Naina.*

Carr, J.,—Where the owner of a vicious animal has notice of its having done an injury or being accustomed to do mischief, he is bound to secure it at all events, and is liable for damages to a party subsequently injured, if the mode he has adopted to secure it proves to be insufficient. *Blackman* v. *Simmons* 3 C. and P. 138; *R.* v. *Higgins*, 1 Lord Raym: 484; B. N. P. 76.

In this case, it is alleged that both the animals were known to be butting buffaloes, and that the police vidahn had ordered their owner to tie them up, or else to cut their horns and yoke them to another, which plaintiff did with his buffaloe, but the defendant neglected to comply with the headman's directions and allowed his buffaloe to remain loose, when it gored the tied buffaloe of the plaintiff. If these facts be proved, the plaintiff would be entitled to judgment. Case remanded. "Supreme Court Tuesday Minutes." 1846.

D. C., Kandy, No. 18,649. } *Silva* v. *Coppe Tamby.* May 26.

Carr, J.,—It is a general rule that all proctors, attornies and solicitors, are privileged to sue and be sued in their respective courts *in person*. Arch. *Forms*, 467; and Arch. *Plead.* 279; 2 Chitty *on Plead.* 29; Grant's *Chonc.*, Voet, *lib.* 3, *tit.* 3; and a proctor of the district court is not obliged to employ another proctor or advocate to conduct his suit therein, or to sign his petition of appeal, his own signature with the addition " proctor of the district court" being a sufficient compliance with the rule. In the petition filed, the applicant signed it twice, viz. as party and as proctor. Where the district court finds a petition not duly signed, it certainly must decline to receive it, pursuant to the 2nd clause of the rule of the 12th December 1843; but if the district court should be satisfied upon proof taken by it, either *mero motu*, or by order of the Supreme Court, that the omission to file a proper petition and give security within the limited time, was not imputable to any negligence or delay on the part of the applicant, in that case it is necessary for the matter to be referred to the Supreme Court to decide on the allowance or rejection of the appeal according to the 5th rule of section viii.

D. C., Kandy, No. 19,362. } *Administrators of the Rt. Hon. Jas. Alex. Stewart Mackenzie* v. *Arabin.* June 13.

Carr, J.,—The order of the district court rejecting the application of the defendant for a commission to examine certain witnesses in England and Scotland, and also to examine the first plaintiff Philip Anstruther Esq. now in Europe, be affirmed, except as to costs, but the pleadings are remanded back to the district court with liberty to the parties to amend their pleadings within such time and on such terms as the district court

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may on motion appoint, and to examine respectively such of the parties as are resident in the Island, or the proctor in the case, as they may be advised to do; and the defendant may renew or make such further application for a commission aforesaid as he may thereon be advised to be necessary for his defence, and he may be entitled to upon fuller affidavits stating generally the points to which the witnesses are to testify or the 1st plaintiff is to be examined, so as that the court may be enabled to judge both from the pleadings and such affidavits, whether the witnesses be or be not material, and whether the examination of the said 1st plaintiff would conduce to the purposes of justice. And it is further ordered that the order of the district court of the 26th May ultimo fixing this cause for trial on the 22nd instant be set aside, and both parties are adjudged to bear their own costs on the above orders, and on this appeal.

Under a recent Ordinance (No. 11 of 1845) for amending the jurisdiction of the Supreme Court, this court is required to shortly state the grounds of its decision when it proceeds on any other reasons than the court below, moreover as the present application involves some new points of practice, the court feels itself bound to more fully record its reasons than in an ordinary case.

The Supreme Court is of opinion that the pleadings in this case do not sufficiently disclose the real facts of the case. The counsel on both sides appear to have endeavoured to have stated as little as they possibly could of the real facts in their respectively pleadings, in order to throw the burden of proof as far as possible on the opposite party, and the consequence is that the pleadings are confused, and the parties have taken issue not upon the real facts; whilst the court is even left to be informed from the affidavit of Mr. McChristie, and the statements made at the bar, that the defendant was let into possession on the 3rd July 1843, pending a negotiation for purchase from Mr. Stewart Mackenzie.

The answer of the defendant does not state any title in himself or a third person. The defendant denies only therein that the plaintiffs are administrators, because there is a will proved in the prerogative court of Canterbury, without setting forth whether such will is executed to pass immoveable property in this colony or not; denies that the premises mentioned in the libel were ever granted or conveyed to, or possessed by Mr. Stewart Mackenzie as the owner thereof, and states that defendant was put into possession on the 3rd April 1843 by one Jas. Stewart in whom no title is alleged, and upon conditions most vaguely stated, and it concludes with a general denial of all the

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other facts stated in the libel. In short, the whole answer shews that the defence is to put the plaintiffs on proof of their title without entering on the question of the defendant's own title, and looking to the facts disclosed in Mr. McChristie's affidavit and stated at the bar, this court cannot in any way favour such a defence apparently made with the sole view of defeating if possible, or at all events of delaying, justice.

The practice of the District and Supreme Courts in this colony in civil suits is moreover as far as possible to enforce a full disclosure of the real facts upon the pleadings, or else by examination of the parties or proctors whose statements (see 10th rule) then become part of the pleadings, and for that purpose a mutual examination of the parties or proctors is allowed with all the latitude of cross-examination, so as to narrow the points for proof before going to evidence. Therefore previous to granting any application for a commission to examine witnesses at a distance or out of the colony which must be attended with much delay, the court ought to feel satisfied, which it does not in this case, that the party applying for such commission has acted conformably to the above practice, and is not premature in seeking for such commission.

The Supreme Court entertain no doubt that it has a discretionary power in granting such commissions, and that the evidence required should appear on the pleadings and affidavits to be material and useful to the party applying for it and the application not made for oppressive or unjust purpose, or to delay justice. See 2 *Phill. Evidence* 385.

The new evidence Ordinance No. 3 of 1846 simply declares that it shall be lawful for the court to issue these commissions, but the old 26th rule of sect. I of the General Rules and Orders has been strongly relied on by the plaintiffs counsel to shew that Mr. Lock's affidavit is not sufficient, as he is not a party in the cause, whereas by that rule it is required that "the party "moving shall declare in open court (subject to punishment "as hereinafter provided by rule 29, if he shall attempt to "deceive the court) that he considers the evidence of such "witness material."

If the court were satisfied that it was precluded by this rule in granting such commissions without the parties declaration, in any case where the commission was clearly necessary and the party was out of the colony, it would of course, in analogy to the practice of the courts of law in England, previous to the late statute empowering them to grant such commissions without consent, require the opposite party to admit the facts or in case of a refusal the court would put off

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the trial from time to time to allow the party to comply with the rule; (*Furly* v. *Newnham*, 1 Doug. 419), but the court cannot consider itself so precluded.

A case has been cited in the Colombo district court wherein Mr. Langslow had allowed the agent of the plaintiff to make the statement for the plaintiff required by 2nd rule of sect. I, but this court is not inclined to follow that precedent. It views the rules as framed for the general guidance of the court and not to embrace every special case (see Rule 47 of sect. I.) and that the absence of the party out of the colony is a "*casus omissus*," to which the rule in question does not extend, but for which the court is bound to provide by acting in such manner as may be most in conformity with the spirit and intention of that rule.

The court has no hesitation in saying therefore that in this case where the party is out of the colony, the proctor is the most proper and fit person to supply the declaration of the party himself required by the above rule, because the proctor ought always to be fully informed of the real facts and merits of the case, and the court has a double hold on him, viz., its own summary power of punishing a practitioner for want of integrity and deception, independent of the charge of perjury. Whereas it has only the latter hold on the agent, and although in the instance of Mr. Armitage cited, and in the present case of Mr. Lock, the affidavits are of course beyond suspicion, yet the court must consider that the general practice of taking any agent's affidavit in such cases might in this colony open a door to fraud for dishonest parties to avail themselves of, especially with the powers they possess of limiting the authority given to such agents both as to time and other respects. The court moreover in holding that an affidavit of the proctor of the defendant ought to have been made in this case, acts in accordance with the English practice, which requires that on an application for a commission to examine witnesses abroad, the party himself or his attorney at least should make the necessary affidavit in all such cases. *Bonham* v. *Leigh*, 5 Price 444, 2 Arch. K. B. p. 29.

Although the common affidavits cited from *Tidd* and *Chitty's* Forms, state only, that the evidence is material, without specifiying the points to which it is intended to examine the witnesses, and which is the form of the affidavit in England usually made to delay a trial upon the absence of a material witness, 2 *Sim.* 485, *Arch. Forms* 557, yet if the witness is abroad, or if from the nature of the application, it may be suspected that it is made merely for the purpose of delay, the above general form will not in general be sufficient, but the

courts usually require that the affidavit shall state the cause of action, and the evidence expected from the witness, in order that they may judge if it be material. 2 *Arch.* K. B. 239, *Bur.* 1513, 1 *W. Bl.* 570. In this colony also by rule 9 of the General Rules of the 17th June 18 4, it is provided that in every affidavit for founding a motion for postponement of trial for absence of a material witness, "it shall be necessary to "state that the witness is not kept away by collusion and also "the points to which such witness is to testify, so that the court "may be able to judge whether the witness be or be not "material," and if such full affidavit be required for even a short postponement, *à fortiori* it ought to be required on a motion for a commission to examine witnesses in Europe, which may delay the cause for many months.

Referring to the latter cases of *Grinnell* v. *Cobbold,* 4 Sim 546.—*Baddeley* v. *Gilmore* 1, M & W.—*Lousada* v. *Templer,* 2 Russ. 561.—*King of Spain* v. *Mendizabal,* 5 Sim. 596. S. C. 2 Russ. 541.—*Lloyd* v. *Key,* 3 Dowl., P. C., a similar practice appears now to prevail with the courts in exercise of their discretionary powers in granting commissions abroad as the affidavit must state the nature of the evidence expected from the witnesses, unless the same is obvious on the pleadings, in order to enable the court to judge whether the evidence sought to be obtained under the commission will on the pleadings in the cause be material and likely to be useful to the party at the trial. In considering how far the affidavit should shew the evidence to be material the court has been moreover much influenced by a case not referred to at the bar, viz. *Woodhead* v. *Boyd,* 6 Price 101. As in following English cases from analogy, for the purpose of laying down any new practice here, this court would certainly prefer adopting a practice which old experienced judges had declared "it would be useful to require" if unfettered by precedent. On the above grounds, the Supreme Court considers the two affidavits of Mr. Lock to be insufficient to support the present application made on the behalf of the defendant for a commission to examine the witnesses in England and Scotland.

The court does not however consider that the answer of Mrs. S. Mackenzie in Chancery ("in which the defendant may "admit every fact, and yet couple the admissions with circum- "stances, that will prevent the plaintiff from using the answer "at law," *Noble* v. *Garland,* 19 Ves 374) can preclude the defendant from examining her as a witness under a commission, if her evidence be shewn to be necessary; nor can the omission of the defendant to examine Captain Stewart *de bene esse* previous to his leaving Ceylon, notwithstanding the notice of his

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intended departure having been given to the defendant as deposed to in Mr. McChristie's affidavit, see *Grinnell* v. *Cobbold*, 4 Sim. 546, nor the affidavit left by Captain Stewart of themselves deprive the defendant of his right to examine Captain Stewart as a witness under a commission, if his evidence be shewn to be material.

What has been stated in respect to this application for the examination of witnesses must apply equally to that part, which extends to the examination of the 1st plaintiff, because from the provisions of the 29th and 31st rules of sect. I. of the general rules and orders of court, it is clear that the court must be satisfied that such examination would conduce to the purposes of justice before allowing the same.

As to the order for fixing the trial on the 22nd instant, it of course cannot stand consistently with the directions hereinbefore given on the first order being affirmed.

In regard to costs, as the parties have allowed both orders to be appealed from in one petition of appeal and each party has succeeded in part under that petition (viz, in reserving one of the said orders) the cost should be divided; but a less technical and better reason is, that as this is in several respects a novel application in this colony and the precedents are conflicting, and apt to mislead (see *Cheminant* v. *De La Cour*, 1 Mad. 211), it is not a case for costs; and it is the invariable practice of the Supreme Court on such appeals to divide the costs.

July 7.

D. C., Galle, No. 12,030. } *Sinne Lebbe* v. *Meera Lebbe.*

Stark, J.,—The order of the district court is affirmed, costs in appeal to stand over.

In this case, the defendant demurred to the libel, and the district court finding the demurrer sufficient as regards the libel being inconsistent and repugnant respecting the time from which rent is a claimed, but insufficient on the other points of the demurrer, adjudged the demurrer sufficient, each party to bear their own costs consequent on the demurrer, and at the same time directed the plaintiff, on his motion, to amend the libel within eight days.

Appeal has been taken by the defendant against this judgment on the following grounds, namely,—

1stly, that the demurrer was sufficient on a point considered otherwise by the district court.

2ndly that the costs of the demurrer should have been given or at least should abide the ultimate result of the case, and

3rdly, that leave to amend should not be allowed without payment of costs occasioned in consequence of the amendment. This last ground was the only one argued at the hearing of the appeal. Now in reference to that, it appears that by the 4th section of the rules of court 2nd July 1842, either party may by motion to the court and once or oftener as he may have occasion, obtain an order to amend his pleadings on cause shewn to the satisfaction of the court and upon such terms as the court shall impose. Here the terms imposed were that the libel should be amended within eight days, and there is nothing in the rule, or on the face of the record to shew that the court did not exercise a sound discretion in the order which it gave. "Supreme Court Tuesday Minutes," 1846.

D. C., Colombo, No. 2.084. } *Arkadie* v. *Schubert.* July 21.

TEMPLE, J.,—The 9th clause of the general rules and orders of the July 2nd 1842 sets out the way in which the judgment by default may be obtained, and in so doing does away with the necessity of a rule nisi to obtain it by declaring that the party may at once make a motion for such judgment, and the district court is authorized to grant it on such motion, provided the party against whom the judgment would operate has had due notice of the motion being intended to be made. This notice does not require the assent of the court before it be served, and all that is required is that, on the hearing of the motion for judgment, "the court must be satisfied that the party in default has had proper notice." In this case the respondents, who were in default, had had proper notice of the motion of the plaintiff's proctor of the 17th instant and made no opposition to it and the plaintiff was therefore entitled to have judgment.

D. C., Colombo, No. 42,377. } *Oorloff* v. *Ebert.* July 21.

TEMPLE, J.,—In this case the cause was called on for hearing in the court below on the 18th of July instant and thereupon the advocate for the defendant moved that "all the plaintiffs to witnesses be kept out of hearing during the trial."

The advocate for the plaintiff objected to one of his client's witnesses being sent out as he, the witness, was proctor for the

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plaintiff in the cause and the advocate required his assistance during the trial.

The district court allowed the motion of the defendant's counsel on the grounds that the 27th clause of the first section of the General Rules and Orders of the 1st of October 1833 makes no exception nor leaves it discretionary with the district court to permit the presence of any witness on the opposite party objection to it.

From this order the plaintiff has appealed. The Supreme Court is of opinion that the order of the district court allowing the motion should be set aside.

The rules of practice are not in the discretion of the district courts to observe them or not, but, like all legislative enactments and written instruments, are subject to legal construction, and the clause in question ought from necessity to be construed to exempt a proctor in the cause and medical and other witnesses called to give their opinion in questions of science, upon facts stated by others. These are exceptions under the general law of evidence and are not abrogated by the rules of practice and those rules are to be viewed "as framed for the general guidance of the district court, and not to embrace every special case."

It is therefore considered and adjudged that the order of the district court of Colombo of the 18th July instant, in so far as it directs the plaintiffs proctor to be "kept out of hearing" be set aside with costs.

July 21.

P. C., Galle, No. 2,254. } *Queen* v. *Coroenerogey Janis*..

Temple, J.,—The order of the police court directing the amount of the recognizance entered into by the appellants as sureties for Coroenerogey Janis in the case No. 2,254 of the said court to be paid into court, be set aside for irregularity.

The facts of this case are these :—

On the 15th April 1846 Janis was convicted for keeping a house for the purpose of common and promiscuous gaming and sentenced by the police court to fine and imprisonment; but he was "allowed to be at large on his calling this sentence into "review within the prescribed time and abide in that respect "the decision of the Supreme Court under recognizance of "twenty pounds sterling, that is himself in ten pounds, and two "pounds and two secureties in the like sum."

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Janis "called the sentence into review" and the present appellants became his sureties in the sum of five pounds each and entered into a recognizance, the condition of which is as, follows, to wit :

"The condition of this recognizance is such that the above "bounded Coroeneregey Janis shall within the prescribed time "call the sentence into review and abide in that respect the "decision of the hon'ble the Supreme Court. Then this recog- "nizance shall be void or else remain in full force."

The sentence of the police court was affirmed by the Supreme Court, and on the 27th May the following notice was issued by the police court to Janis.

"To the police office of Dangedere.

"Summon the abovenamed defendant to appear before the "police court of Galle at 10 o'clock on the morning of the 30th "instant to hear the order of review made on the above case, "and in default the recognizance entered into by you will be "forfeited." This notice or summons was served on Janis, but he did not appear on the day therein appointed and the appellants were thereupon summoned on that day to produce on the first of June the body of Janis and were informed that in default thereof their recognizance would be forfeited.

The sureties appeared on the first of June and pleaded that in consequence of Janis having had notice of the result of the appeal before the sureties, they were unable to produce him in court on that day; and they therefore prayed for time to do so. This prayer was refused and the penalty on the bond declared forfeited, and this order is the subject of the present appeal. Janis surrendered himself on the 4th June.

In these circumstances the main question for the consideration of this court in this case is, whether Janis forfeited his bond; for as the obligation of the sureties is accessary to that of their principal, if the principal is not obliged, neither are the sureties. Then was Janis called upon to surrender himself? By the notice above quoted he certainly was not; nor was he even informed by that notice that the sentence of the police court had been affirmed and it does not appear that any other notice was ever issued to Janis. This notice was not sufficient to justify the police court in calling upon the appellants to produce Janis within so short a time and in refusing to grant them resonable time for that purpose and declaring that penalty of their bond forfeited.

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Augt. 1.

P. C., Ratnapoora, No. 316. } *Balahamy v. Sinho Appu.*

TEMPLE, J.,—In this case the defendant was charged by the complainant, as a Government grain renter, with cutting and thrashing a chena without giving notice to the complainant, as such renter, as required by the Ordinance No. 14 of 1840 clause 14.

The defendants pleaded "not guilty," and the court below after hearing the evidence for the prosecution, dismissed the complainant on the ground that it was not incumbent on the defendant to prove that he had given the required notice until the complainant should have given "some thing like proof of cutting without notice." The Supreme Court is of opinion that under the plea of not guilty, all that the complainant had to prove, and which he did prove, was that the defendant had cut and thrashed his crop; and it was incumbent on the defendant to prove that he had complied with the Ordinance by giving the notice thereby required. It is a general rule of evidence, that the burthen of proof lies on the person who has to support his case by proof of a fact which lies more peculiarly within his own knowledge or of which he is supposed to be cognizant. See *Phillips and Amos on Evidence* page 829.

The proceedings in this case must therefore be quashed and the complainant is left at liberty to proceed anew.

Augt. 18.

D. C., Colombo, No. 2,303. } *Dorabjee v. Meera Lebbe.*

TEMPLE, J.,—This is an action on a promissory note with a prayer for a provisional judgment in the libel. The usual summons was issued through the fiscal to the defendant to appear and answer, without calling upon him to admit or deny his signature. The defendant entered his appearance; and sub sequent to this and before he put in his answer, the plaintiff's proctor served a notice on the defendant (not a summon through the fiscal) informing him that on a certain day he would move for a provisional judgment on the libel.

The Supreme Court is of opinion that this notice was insufficient to bring the defendant before the court for such a purpose. The defendant should have been called upon by a summons served through the fiscal, inasmuch as it was to supply what might, and in practice always does, form part of original summons to appear, and as it was to answer to an

essential part of the libel, it should have been served in as solemn a way as the summons to answer the other part of the libel. This notice is also informal because it does not call upon the defendant to admit or deny his signature to the promissory note (*Van Leeuwen* p. 629). With respect to the erasure in the promissory note, the Supreme Court is of opinion that that erasure is not material enough to stay namptissement.

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It is therefore considered and adjudged that the judgment of the district court of Colombo of the twenty first day of July ultimo be set aside with costs.

D. C., Kandy, No. 19,362. } *Anstruther* v. *Arabin*.

Augt. 22.

TEMPLE, J.,—There being an appeal on the merits of this case against the final decision of the district court of Kandy, this court sitting in Colombo could not give any judgment which would clash with any judgment which might be given by it on hearing, in Kandy, the appeal from the final decision, and could not grant the commission sought to be obtained unless both the appeal should, by consent of the parties, be heard at once in Colombo. But as both parties wished that this interlocutory appeal should, if possible, be now decided, and as the opinion of the court is against the granting of the commission, the court entertains the case, and determines the same on the following ground.

The subject of the appeal now before the court, is an application on behalf of the defendant for a commission to examine witnesses in Great Britain. But before considering the present application, the court must notice the former proceedings in this case upon a similar application, which was likewise heard in appeal before this court. This court in refusing that application, strongly remarked on the insufficiency of the pleadings in the cause, in as much as they did not disclose the real facts of the case; and considering that the practice of pleading in this colony is more in accordance with the rules of equity pleading requiring the fullest disclosure, the court should feel satisfied that the party applying for a commission had first, in as full a way as he possibly could, brought out on the pleading the real facts of the case. The court was then of opinion that the pleadings did not sufficiently disclose the real facts, and the application was thereupon dismissed with liberty to the parties to amend their pleadings, and to examine such parties as were resident in the island or their proctors in the case. The defendant was further permitted to

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renew or make such further application for a commission as he might thereon be advised was necessary for her defence and he might be entitled to upon fuller affidavits, stating generally the points to which the witnesses were to testify. So that the court might be enabled to judge both from the pleadings and such affidavits whether the witnesses were material or not. Now no alteration has taken place in the pleadings, no examination has been had of any of the parties, or their proctors, and the court is unable to feel satisfied that the party applying for this commission has first, in as full a way as he could, or even in any way, brought out, as he might have done upon the pleadings, the real facts of the case.

Th affidavit on which this application is moved is certainly more full than that upon which the former application was made. But it does not satisfy the court that the evidence sought by the present application is material and indispensable to this case as it stands upon the present pleadings. The affidavit is also insufficient when made by a proctor who preludes the whole of it by stating that "he has received all his instruc- " tions from Mr. Lock through his counsel here and that he has " neither directly or indirectly had any communication with the " defendant," his client. The name of that counsel is not mentioned but if it had been, can a proctor whose duty it usually is to give instructions to his counsel, make a satisfactory affidavit when he in the commencement states that the instructions (and as the court understands it the instructions upon which his affidavit is framed) are derived from an unnamed person and that person a counsel in the cause. This may admit of explanation, but none is given and in its absence Mr. Smith the proctor shews his incompitency to make this affidavit.

It is therefore considered and adjudged that the judgment of the district court of Kandy of the thirty first day of July last discharging with costs, "the rule nisi calling upon the " plaintiffs to shew cause why a commission should not issue to " examine certain witnesses in Great Britain and why the trial " of this case should not be stayed until such examination takes " place" be affirmed with costs.

Sept. 1. D. C., Jaffna, No. 1,019. } *Thilippo* v. *Domingo.*

Temple, J.,—* * * The award made by the arbitrators is void on other grounds. One of the parties to the submission bond viz. the 2nd defendant, died before this award was made, and this occurrence revoked the submission *in toto* (Watson on

Arbitration, p. 23, 27), and there is no provision in that instrument that the death of any one of the parties should not operate as a revocation.

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D. C., Jaffna, No. 14,036. } *Moorgappa Chetty* v. *Comarasamy*. Oct. 2.

CARR, C. J.,—No sufficient causes shewn upon the application for the examination of the plaintiff. It is clearly discretionary with the court to refuse such examination, if it considered that it would not conduce to the purposes of justice, whether the application be made under the 29th and 31st rules of section 1 of the General Rules and Orders of court, or under the 7th clause of the Ordinance No. 3 of 1846, which last enables the court to issue a commission for such examination.

D. C., Kandy, No. 19,642. } *Hamilton* v. *Ross*. Oct. 9.

CARR, C. J.,—The interlocutory order of the district court is reversed. The plaintiff is clearly entitled to examine the defendant and upon the defendant's admission of the debt on such examination, the plaintiff ought to get judgment without further proof.

Looking to the practice of the English Courts upon interlocutory judgments by default, 2 *Arch.* K. B. P. Chap. 3, 4,— 4 *Taunt.* 487, and to the old rule 24 of section 1, whereby on any material witness of the defendant being absent, that plaintiff was "at liberty to proceed *exparte* to the hearing and decision of the case unless &c," the Supreme Court considers that whenever the plaintiff is required to adduce further evidence under the 4th rule, the defendant should not be precluded from being present thereat, nor from cross-examining the witnesses adduced by the plaintiff. Although the proceeding would be *exparte* so far as that the plaintiff's case could be alone gone into, and on its being closed the defendant could not be allowed to enter into a defence, to exclude the defendant from court or to prevent him from employing counsel to watch the further proceedings would be partially to deprive him also of fair means of appeal, which he has undoubtedly a right to, upon any irregularity in taking such further evidence; but even if the practice were correctly stated by the district court, the defendant

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being thus made to suffer from his own default, affords no reason why the plaintiff should on that account also suffer by losing his right to summon and examine the defendant; such a course (if sanctioned) would be to allow the defendant to reap a benefit from his own wrong.

The district court proceeds further to "judicially" notice that the defendant was an applicant at the time for the privilege of *cessio bonorum*, but such an application having been made, ought not in its present stage to affect or hinder in any way the proceedings of a creditor in his suit for obtaining judgment for the debt due to him.

The Supreme Court must also observe that where further evidence is required under the 4th rule, it should be taken at the time, or on a day to be appointed by the judge, and that the plaintiff had a right to expect some early day to have been specially named for that purpose and not to have had the case set down on the trial roll, which would delay it for months unless advanced by a subsequent motion at the plaintiffs own costs.

Oct. 20.

D. C., Galle, No. 8,827. } *Queen* v. *Abraham*.

The criminal complaint filed in the district court was dismissed in these terms:—

CARR, C. J.,—The Supreme Court ofcourse concurs with the district court that the Ordinance No. 12 of 1843 does not apply to contempts of court, and that the district court may proceed without the interference of the Queen's Advocate in all cases of contempt committed before it or against the execution of its process.

But the Supreme Court considers that the alleged disturbance of the defendant is not properly a ground for the summary proceedings of contempt, because the plaintiff appears, by his affidavit and the fiscal's return, to have been put into quiet possession pursuant to the decree in his favor in April 1845, and this complaint is not made until the 28th July 1846, and then only upon vague general assertion, that "the defendant has been and is hitherto" withholding and retaining forcible possession of the northern part of the garden.

If this disturbance commenced immediately on such possession being given by the fiscal then in the neglect of the plaintiff to bring it to the immediate notice of the district court, would in itself afford sufficient ground for dismissing this complaint;

and leaving the party to resort to a new action. But the Supreme Court finds on enquiry that the general practice in Colombo, where a party has once been put into quiet possession under a decree by the fiscal, and a subsequent trespass occurs, is to seek redress by instituting a new action, in which the plaintiff has only to plead his having been put into possession under the former decree, and the defendants subsequent disturbance; and the defendant must join issue on these points, and would not be allowed to enter into further proof of his claim set up in the former suit; upon judgment being given against the defendant, the court would award exemplary damages for such renewed disturbance. "Supreme Court Minutes," 1854.

D. C., Jaffna, No. 4,240. } *Candappa* v *Nagamanny.*

CARR, C. J.,—The suit has been instituted upon the dowry deed in question, and where the form of the pleadings is such that at the trial it is necessary (as in this instance) to produce the deed, and on its production it is found insufficiently stamped, the case may be allowed to stand over to get the deed duly stamped, but if the plaintiffs do not do it, the defendants should be absolved from the instance, on the cause being set down for further hearing.

If the Supreme Court was to sanction in such a case, the proceedings being remanded back for further trial, in order that the plaintiffs might give evidence of long possession and amend their pleadings thereon by putting in issue a prescriptive title, the practice would tend only to encourage the filing of such deeds, and to defeat the laws for the due protection of the revenue on stamps; and it is obvious, that if this be a genuine deed and it confer a title on several lands amounting in value to Rds. 376, which are now possessed by the plaintiffs and their daughters in dower, it is the interest of all to contribute the £4 10*s*. to get it duly stamped and not to risk for the future their title to proof of possession alone.

P. C., Kaigalle, No. 1,145. } *Queen* v. *Punchyraale.* Oct. 27.

The judgment in this case was reversed and the prisoner acquitted.

CARR, C, J.,—The conviction cannot be supported, as the charge is alleged to be "for wilfully making a *false accusation* against one Calingooralle for cattle stealing before the justice of

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the peace" and from the note of the magistrate it would appear that the false information was in the *affidavit* before the justice of the peace for arrest, but the above offence is not punishable under the 18th clause of the Ordinance No. 15 of 1843.

Oct. 27.

D. C., Colombo, No. 783. } *Philip* v. *Bastian.*

Carr, C. J.,—The interlocutory order of the district court must be amended by the motion being ordered to stand over, upon the objection taken by the two heirs of the defendant now before the court, and the plaintiff is required to cite the four other sons, whom these two heirs affirm to be their coheirs and to have been jointly with them in possession of the land in dispute since their father's death. And if any of the other sons on being so cited should admit their being coheirs, the district court must thereon order such of them to be co-defendants in this suit with the two heirs now cited, but if any of them should renounce, or disclaim, and it should appear also to the district court that they have been unnecessarily cited owing to the objection made by the said two heirs being vexatious, or containing false statements, the district court should thereon adjudge the said two heirs to pay all the costs incurred upon any such wrong citation.

The practice of the Supreme Court has been upon the death of a party to a suit, to allow his heir or legal representative to be substituted by an order of court, upon application made to it for that purpose either by motion or petition, without any bill of revivor being filed. (See L. B. 3rd May and 9th October 1834 and 19th September 1836. Also Negombo appeal 2874 decided on 14th December 1836.) The acting chief justice is inclined to consider that a petition is the preferable course for any application to the district court of this nature, as it is clearly the general course for all *exparte* application to the court, where no cause is depending, or where the person applying is not a party to a cause;—the heir therefore applying to be substituted should strictly in his view proceed by petition, and uniformity of practice alone would render it accordingly expedient to require the opposite party to adopt a similar course, but as the practice has hitherto allowed such applications to be made by motion, the Supreme Court cannot reject the present application upon the ground of the plaintiffs proctor having made it by motion upon affirmation of the party, and not by petition.

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As to the necessity of summoning all the other sons, it must depend on their having excepted or interfered with the estate of their deceased father, and on that point the court has now conflicting affidavits adduced before it. It is clear however that the two heirs cited before the court are liable to be made defendants to this suit, and the district court should proceed to ascertain if their objection be valid, by citing their alleged co-heirs, and making such order thereon in respect to who should be joined as co-defendants in this suit, and by whom the costs of the further proceedings on this objection should be borne, as it may see fit.

The costs of this appeal are to borne by both parties, but the costs of the motion in the district court are to abide the directions of the district court upon the further proceedings thereon.

D. C., Kurunagala, No. 9,015. } *Kirri Manika* v. *Namberale.* Oct. 30.

Carr, C. J.,—The interlocutory order of the district court is reversed, as the district court has no power to alter its final decree in the cause, nor can it, where it imposes any punishment for contempt, remit the same on a subsequent day, unless the sentence be conditional, as any commitment until the prisoner comply with some order passed, or until further order of the court. Although there is an instance mentioned in Sir Chs. Marshall's notes where the Supreme Court has sanctioned a district court awarding double costs under the 29th rule of section 1, the collective court has subsequently held the practice wrong, as a fine is the proper mode of pecuniary punishment, and a fine must be payable to the Queen, and not to a private party at the discretion of the court, unless it be empowered to do so under an Ordinance, or Legislative Act. Under these circumstances, the Supreme Court thinks the payment of double costs ought not to be enforced, and unless the plaintiff will enter a consent on the record to forego all claim thereto, the Supreme Court will allow the defendant to appeal from that part of the decree awarding them, notwithstanding the lapse of time, and the plaintiff will have to bear his own costs thereon.

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Dec. 8.

D. C., Kandy, No 19,630. *Mohamado* v. *Assena Marikar.*

Stark, J.,—This was an action on a lease between plaintiffs and defendant to recover from the latter the second year's rent payable like the first, by advance. The defendant admitted the lease and his payment of the first year's rent in advance, but denied being liable for the amount now claimed, as it had been agreed by and between the parties that the second year's rent should be paid at the lapse of the said second year, and also because he had not used or occupied the premises for the full second year. On this the plaintiffs demurred, alleging that the defendant having in the first part of his answer admitted the deed of lease filed by the plaintiffs he is bound by the provisions of the same, and is precluded from pleading any agreement or understanding other than or independent of the agreement set forth in the said deed.

The district court allowed the demurrer with costs, and further ordered the defendant to file another plea or answer to the libel. Against this further order the plaintiffs appeal, and contend that judgment for them on the demurrer should be final and definitive. In setting forth the grounds of the decree, the district judge says that "by the strict rules of English "pleading the plaintiffs might have been entitled to judgment, "but it has been the practice of this court to allow a party to "put in a better plea or to amend his pleadings, and the court "sees no reason for departing from this practice in the pre-"sent case."

The Supreme Court considers the practice of the court a sufficient ground, and moreover is of opinion that the rules of pleading in this colony, having in view an explicit statement of all facts of the case which are material to a just judgment on the merits, it would not be agreeable to those rules to give final judgment in this case in the present stage of the proceedings, two grounds of defence being stated, *one* that it has been agreed by and between the parties that the rent in question should not be payable in advance, the *other* that the premises have not been used or occupied for the full term.

Dec. 15.

P. C., Matela, No. 250. *Kaloo Banda* v. *Goloo Banda.*

Stark, J.,—In this case the defendant was charged with assault and striking the complainant with a stick and hands at the field Madawelle. He pleaded not guilty, and without examining any witnesses on either side, judgment was given

for the defendant on the ground set forth in the remarks of the police magistrate, which are to the following effect :- -' Parties present, each party claims the field in which the alleged assault is said to have occurred, therefore as it is not possible to know who was the intruding party, they are directed to settle that matter by a civil suit—the present charge to stand over till the right to the said field be decided.'

This course of proceeding is not agreeable to the rules and orders, nor to the course adopted in England in analogous cases.

By the rules and orders for police courts sec. 8, it is provided that ' on the day of hearing, the police magistrate shall enquire into the charge or complaint and shall cause the clerk to read the same as entered in the record book and shall call on the defendant to plead to the same and shall hear such legal evidence as the prosecutor may produce in support thereof; and the said police magistrate shall then hear any statement which the defendant may make relevant to the charge or cause of complaint and his witnesses if any in support thereof or for the defence.' And according to the practice in England, besides protesting against and commenting on the validity or effect of the evidence tendered against him, the accused may defend himself by proving not only that he is within some proviso or exception which excuses or qualifies the fact charged, but also that the act complained of was done under an asserted authority, or pursuant to a claim of right of property ; for when the title to property comes in question, the exercise of a summary jurisdiction by justices of the peace is ousted,—a principle which is not in general founded upon any legislative provision, but is a qualification which the law itself raises in the execution of penal statutes and is always implied in their construction. From the cases decided on the point it would seem that without entering into the substantial merits of the title set up, it is sufficient, to stop the summary interference of a magistrate by conviction, that even a colour of title appears to be in question and that the act was really done under an assertion of that supposed title, however weak the claim may appear to be. The rule however, it is admitted, ought not to be so extended as to enable an offender to arrest the summary jurisdiction of the justice by a mere fictitious pretence of title. An assertion of right therefore is not to be regarded where it evidently appears that no colour or pretext for it exists, as where the party's own showing or other manifest circumstances prove the claim to be wholly groundless.

In the present case there is nothing before the court to

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shew the nature of the assault charged, nor the nature of the claim alleged in defence to the accusation. The police magistrate should proceed with the case on the principles above set forth; but having regard also to the character and circumstances of the assault charged, according as the same come out in evidence.

It is considered and adjudged that the judgment of the police court of Matela of the 24th September 1846, should be set aside, and the same is set aside accordingly, and the case to proceed in due course.

Dec. 22.

D. C., Jaffna, No. 1,894. } *Sagoona* v. *Mahamadoo.*

In this case the district judge on the application of the defendant ordered the attendance in court of plaintiff's wife (who was the 2nd plaintiff), for examination.

Against this order the plaintiff appealed.

STARK, J. affirmed the decision of the district court in these terms:—

The 29th clause of the 1st sec. of the General Rules and Orders of the 1st October 1833 provides that any party to a suit or his advocate or proctor on his behalf shall be allowed to examine any adverse party at any stage of the suit, if the district judge shall consider that it would conduce to the purposes of justice; and by the Ordinance No. 12 of 1843 sec. 14, it is enacted that every party to a civil suit before a district court shall be liable to be summoned and examined *viva voce* in open court or by interrogatory to be issued by such court, but not upon oath, if such court shall consider that any such examination shall be necessary.

In the present case the district court has been of opinion that the application for the personal attendance of the second plaintiff for *viva voce* examination should be allowed under the circumstances of the case and thereby determining that the ends of justice required such personal attendance; and the Supreme Court sees no reason to dissent from the decision of that court.

The circumstance of the second plaintiff being a Mahomedan female cannot be allowed to operate as a ground of exemption from the examination ordered; for whatever may be the feelings of repugnance or other sentiments entertained against

appearance in public, the Supreme Court does not feel at liberty to yield to these without consent of parties or some special legislative enactment on the subject. In support of the present appeal, a judgment has been referred to (Jaffna 2136) where the appellant supposes the privilege claimed was allowed, but the decision there given can form no proper authority, it being probable that the attendance of the party there was dispensed with on other grounds than her being a moorish female. "Supreme Court Tuesday Minutes," 1846.

In re *Gabriel Perera*, a proctor.

"Supreme Court Tuesday Minutes," 1847.

Jan. 13.

The deputy Queen's Advocate (Mr. Selby) for Gabriel Perera moved that a *mandamus* in the nature of writ of *habeas corpus* be issued, directed to the fiscal of the Western Province, to bring before the court the body of the said Gabriel Perera and to return the cause of his imprisonment.

The application was founded on an affidavit of Gabriel Perera, deposing that he was illegally imprisoned under a warrant of arrest, of which the following is a copy:—

WARRANT OF ARREST FOR CONTEMPT.

" Criminal Jurisdiction.

In the District Court of 7 *Korles.*

" To the Fiscal of the Western Province.

" Take into custody the body of Mr. Gabriel Perera, proctor of the district court of Kornegalle, now at Colombo, charged with contempt of court, and send him before me forthwith.

" Given under my hand this 24th day of December 1846."

(Signed) " E. H. SMEDLEY, D. J."

Mr. STARK, J. granted the application for *mandamus,* making it returnable the following day at 12 o'clock.

On the following day (13th January 1847) the defendant was brought before the court, the fiscal returning at the same time the warrant of commitment above set forth, as the cause of the defendant's imprisonment.

STARK, J.,—This is an application for a mandate in the nature of a writ of *habeas corpus* to bring up the body of Gabriel Perera now in the custody of the fiscal of the Western Province and to discharge him therefrom; and the ground of the application is that he is detained illegally and without sufficient warrant.

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The warrant of arrest is in these words:—(set forth above.)

It is a general rule that, in all cases of imprisonment on warrant, the cause of commitment shall appear on the face of the warrant. What shall be deemed sufficient cause to satisfy this rule must be ascertained by reference to the great principles which secure the liberty of the subject. For though there are in the English books various decisions and dicta on points analogous to the present, yet they are neither so uniform nor so settled as to afford a certain guide in the determination of the present case. This much, however, is clear from them, that the whole tendency of modern cases is (as might indeed be expected) in favour of liberty, and in maintenance of the principle that the liberty of the subject shall not be taken away or abridged, but for some certain and good cause shewn. So, though commitments for high treason in general are considered sufficient as a commitment for treasonable practices, yet a charge of felony generally is not enough: the warrant must contain the special nature of felony, as for murder, burglary and the like; and the reason assigned is not only that a charge of felony generally wants certainty, but also that it may appear to the judges on a *habeas corpus* whether it be felony or not. The present case is of the same description and the warrant is open to both the objections now stated. It charges the prisoner with contempt of court, but this charge or appellation comprehends under it a great variety of offences of different degrees of criminality and requiring in different cases a different course of proceeding. Under the general charge of contempt of court therefore, the cause of commitment does not appear without a specification on the fact or facts constituting the species of contempt intended; and whether the prisoner is rightly charged with any species of contempt of court whatever cannot be ascertained from the present warrant. In these circumstances to allow the warrant, would be against law and at variance with the principles of justice and the constitution.

The court feels the less difficulty in coming to this conclusion considering the terms of the Rules and Orders for the guidance of parties in cases of contempt of court and the form of warrant of arrest for contempt, though the same be not binding by way of authority.

The court is of opinion that the warrant of arrest in this case is insufficient and accordingly that in respect of the same the prisoner be discharged out of custody forthwith.

C. R., Bentotte, No. 1,671. } *Mendis* v. *Himmappooa.*

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Jany. 19.

STARK, J.,—In this case the plaintiff complains that the suit brought by him in the court of requests has been improperly dismissed.

The commissioner says that 'on examination of the court records, he finds that plaintiff has twice already, brought this or an identical action, that he has twice been absent on the day of trial, and that the case has already been twice dismissed.' Nothing here stated however affords a sufficient ground for the judgment given.

Interest reipublicæ ut sit finis litium is a good maxim; it flows out of the very nature of society, for unless there is an end to litigation, rights would for ever remain uncertain and no man would ever enjoy that security of person and property, without some degree of which society could not subsist, and it may be added in proportion to the enjoyment of which in any society civilization advances, or has opportunity to advance.

Accordingly it is a rule of law, that a solemn judgment on any matter standing *pro veritate accipitur.* But this effect cannot attach to a judgment given without a hearing of the case, which appears to be the predicament in which the subject matter of the present suit is placed. If the judgments in the previous cases were in respect of the absence of the plaintiff, and so of the nature of nonsuits without evidence taken in the cause, they do not amount to *res judicata,* which is properly defined a legal judgment on the same point between the same parties, on the same grounds or *media concludendi* after argument or confession.

D. C., Kaltura, No. 12,925. } *Rodrigo* v. *Dombalahamy.*

March 9.

CARR, C. J.,—The Supreme Court has decided that it is not necessary to revive a suit against the heir or legal representative of a deceased party, that a bill of revivor or petition setting forth the facts, should be filed, although they are clearly the preferable course; but the application for an order to revive may be also made by motion; yet such a motion ought to be supported by the affirmation of the party or affidavit, and not rest simply on the statement of the proctor in the written motion that the party was dead, and the person to be cited was the widow, and had done acts which made her an executrix *de son tort.*—Affirmed.

"Supreme Court Tuesday Minutes," 1847.

April 27.

D. C., Galle, No. 12,671. } *Barton* v. *Perera.*

This was an appeal from the judgment of the court below, which, on the plaintiff's motion, granted an injunction for the removal, *pendente lite*, of an obstruction put up by the defendant to a carriage way, the right to erect which formed the subject of the suit between the parties.

Temple, J.,—It is considered and adjudged that the interlocutory order of the district court of Galle of the 12th day of March 1847 be reversed with costs.

This is an action brought to remove a wall which is stated to have been built by the defendant so as to obstruct a private carriage way to the plaintiff's house, leaving only a foot path ; and after the filing of the libel, the plaintiff moved for an injunction to the defendant to remove the wall, *pendente lite*, and the court below granted it; but the Supreme Court is of opinion that that injunction should be dissolved. Injunctions are usually granted to preserve property, pending a trial, to restrain parties and leave matters in their present state, until the rights of the parties are decided. But to allow the injunction prayed for in this case, would be to grant, in a summary manner, and without a trial, the chief part of the prayer in the plaintiff's libel, namely, the removal of the obstruction complained of ; and if the defendant succeeded in the end, she could not be placed in *statu quo*.

May 4.

D. C., Jaffna, No. 1,227. } *Velayuder* v. *Cadergamer.*

This was a suit for the recovery of certain lands. The defendants failed to file their answer in due time and a rule was taken on 8th December 1845 to shew cause on 19th December why judgment should not be passed against them. The rule was subsequently extended twice to the 29th March 1847; on that day the defendants appeared and obtained leave to file answer within eight days on paying the costs incurred by their previous default. Access to certain papers was stated by the defendants to be necessary to enable them to prepare their answer, and on 9th April 1847, they moved for a further extension of eight days on the ground that they had not received the copies of the papers applied for. The district judge refused to grant this motion "unless by the consent of the opposite party."

The defendants appealed and the Supreme Court (TEMPLE, J.) on 4th May 1847 reversed the decision:— "Supreme Court Tuesday Minutes," 1847.

It is considered and adjudged that the interlocutory degree of the district court of Jaffna of the 9th of April 1847 be set aside, and the case remanded to the district court for the defendants to file their answer within such time as the district court shall appoint.

The Supreme Court does not consider that under the 4th clause of the rules of court of 2nd July 1842 the consent of the opposite party is necessary, before a party can obtain further time to plead. In practice one or two extensions should be granted on sufficient cause shewn to the satisfaction of the court or on affidavit of merits. If further extensions are applied for, the court, if it see fit, may require that the opposite party should have notice of the proposed application.

P. C., Matura, No. 1,718. } *Don Thomis* v. *Hengo*. May 11.

This was a prosecution at the instance of an arrack renter for breach of the 32nd and 37th clauses of the Ordinance No. 10 of 1844 for possessing a large quantity of arrack without a license.

The police magistrate, after evidence led, fined the defendants in £5 and confiscated the arrack seized, as well as a paddy boat in which it was found, with its other cargo.

The owner of the boat and cargo, who was not a defendant, nor, according to the evidence, in any way implicated in the matter, brought the police magistrate's decision in review, in so far as it confiscated his paddy boat and such of its contents as belong to him, on the ground that the boat was not employed in the removal of the arrack.

TEMPLE, J.,—I am opinion that the sentence of the police court of Matura of the 16th day of February 1847 should be corrected by setting aside so much thereof as doth declare the boat and its contents (except the arrack) forfeited, and the said sentence is hereby corrected accordingly.

The prosecution in this case is 'for breach of the 32nd and 37th clauses of the Ordinance No. 10 of 1844 in possessing sixteen gallons and two and three quarter quarts of arrack without a license'; and the case though not otherwise cognizable by a police court, was entertained in the court below under

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the provisions of the 7th clause of the Ordinance No. 2 of 1845. The arrack in question was seized while being put into a boat, and the police magistrate having found the first four defendants guilty under the 37th clause, sentenced them to pay a fine of £5; and declared the arrack and the boat and its cargo forfeited. The owner of the boat has brought this case under review, and prays for the release of the boat on the ground that it was not employed in removing the arrack. Possibly it had been intended to use the boat in removing the arrack, but that intention would not make the boat liable to confiscation unless there were evidence that the boat had been so used. The police court however having decided this case upon evidence, the Supreme Court felt reluctant to interfere with its judgment, and called upon the Queen's Advocate to appear and support it, but that officer gives up the boat and of course the cargo also, which was clearly not liable to forfeiture.

May 18.

P. C., Colombo, No. 6,095. } *Doe v. Voors.*

This was a complaint "for a breach of the 11th clause of the Ordinance No. 9 of 1845, in having on the 23rd day of April 1847 wilfully demanded and taken an additional sum of six pence for a pony belonging to the complainant for which toll was previously paid in the morning of the said 23rd day of April 1847 while crossing the bridge of boats at Grandpass."

On appeal, Mr. Temple, J.,—The Supreme Court is of opinion that the judgment of the police court of Colombo of the 3rd day of May 1847 should be set aside and the same is hereby set aside accordingly.

The charge as explained by the evidence is against a toll keeper for demanding the full toll upon a carriage returning with a horse which had passed through the toll on the morning of the same day, and had then paid the usual toll upon a single horse, such horse being then led out for the purpose of returning with the carriage.

The 2nd clause of the Ordinance No. 9 of 1845, under which this toll was demanded, levies the toll upon the vehicle drawn by the horse and not upon the horse drawing the vehicle. The vehicle then only is free, and the horse, no toll having been paid upon him, is not free from return, except he should return with the same vehicle. Such being the construction to be put on this Ordinance, it follows that no previous payment of toll for a horse can operate as an exemption from any portion of the

toll demandable upon a vehicle drawn by such horse, although the horse itself might pass toll free under the 6th cl. *Chitty's Burn's Justice, 22nd Ed. tit. Highways*, sec. 9 p. 244 and cases therein cited.

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D. C., Colombo, No. 3,360. } *Perera* v. *Morris and Smedley.* June 5.

Temple, J.,—This is an action of libel for writing and publishing a certain defamatory letter set forth in the declaration. It is brought against two parties, but it is with the defendant Morris only that the court has now any concern. In answer to the declaration this defendant has pleaded 1st, the general issue of not guilty, and 2ndly, a justification from the truth of the alleged libel. To this answer the plaintiff has filed a demurrer stating many grounds for demurring; but he has relied in argument on twenty one only of the objections taken; but before entering upon a consideration of the demurrer and the other points which arise in this case, there is a preliminary question to be decided of vast importance and one, which as far as the court is at present advised, still remains an undecided one,—namely, by what law this case is to be governed. Whether by the law prevailing at Kornegalle, the place where the cause of action arose, or by the Dutch law, such being the law prevailing in the district of Colombo where this action was instituted, it having been thus instituted as one of the defendants is the district judge of Kornegalle, and Colombo being one of the next adjoining districts. But though this case was properly removed from the district of Kornegalle to that of Colombo, the court is of opinion that the law of the former place must still prevail and that the case must be decided according to the Kandyan law, if any such there be relating to slander, but upon this subject the Kandyan law is perfectly silent. What law then is to be had recourse to to supply the deficiency of the Kandyan law in this respect? It has been argued for defendant that the English law is to be called in as the law of the conquering country. But the court considers that the laws of England cannot prevail in any conquered country until so declared by the conqueror or his successors; which has never been done as regards the Kandyan districts; and that whenever the Kandyan law is silent upon any particular subjects, such subjects are to

Clarke's Col. Law p. 6. *Blankard* v. *Galdy*, 2 *Salkeld* 412. *Chitty's Prerog.* p. 30.

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be decided according to the rules of natural equity and right. This case then is to be thus decided and by such rules. In deciding what are the rules of natural equity and right, the court will not interpret them according to any arbitrary ideas upon the subject, but will take as its guide and apply as far as they are applicable to this case and the circumstances of the Kandyan districts, the principles of equity as administered in the courts in England and will do so for two reasons.

1st.—Because that system is founded upon principles of natural equity and universal justice more than any other system with which the court is acquainted.

2nd.—Because by so doing the court will be following a guide which more nearly than any other approaches the Dutch law which prevails in the other parts of the island, and thus bring about so far an uniformity of law and practice throughout the island. We then come to the consideration of the demurrer itself and the various grounds which it sets forth. The first ground of demurrer stated is that the pleas of the general issue and justification from truth are inconsistent with each other, the one denying malice, and the other being a simple plea of truth admitting it, and cannot under the General Rule of court of 5th July 1842 sect. I. be pleaded together, inasmuch as that rule directs "that every answer shall admit or deny or confess and avoid all the material facts alleged by the plaintiff and shall clearly and concisely state and set forth the same." Now admitting the consistency of the plea, the court thinks the most liberal construction should be given to the rule in question, as has always been the case in the construction of our rules of court. And when it is considered that such inconsistent pleas, when allowed by the Statute 4, Ann. C. 16 in all English courts of record, the courts of equity in England, though not coming within the statute because they were not courts of record, have decided that a defendant may there also plead double, because the same latitude should be allowed in a court of equity as in a court of law; and when it is considered that the form and procedure of our courts (except *viva voce* evidence) approximate most to Chancery proceedings; and the rule being only directory and not positively forbidding any double pleading, the court holds that under this rule two inconsistent pleas even may be pleaded.

Lewis v. *Walker* 4. *B. and Ald.* 603.
Fairman v. *Ives* 5. *B. and Ald.* 646.

Stephen on Plead p. 306.

Gibson v. *Whitehead* before *Leach V.C.* cited in *Mad. Ch. Pr.* 229. *Lube.* 348.

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But the answer of the defendant should be considered in the nature of an answer in equity (in which there is always contained a general traverse) and as such it should fully state all the circumstances of the case. It was stated by the plaintiff's advocate that equity pleadings must not be inconsistent, and in support of his position referred the court to *Story's Equity Pleading*, sec. 653 and 656. But we find on looking into the accompanying sections that his reference related to pleas on equity and not to answers, the former not being an answer to the bill but resting on some new fact or point founded on matter stated in the plea and which precludes the necessity of answering such part of the bill as the plea refers to. For these two reasons the court holds that defendant's answer to be good in this respect.

Mitford's Pleading 245. *Story's Pleading.*

The next (the 2nd) objection to the answer is, that the date of the complaint made against the plaintiff to the district judge of Kornegalle by Madere Armogam and Welleyan Chetty is not stated. It only stating that it was made "on or about the month of October then next ensuing at Kornegalle." Now there does not appear to be any ambiguity by which the plaintiff can be misled in any way from the day of the month not being stated, every thing is stated which can inform him what the complaint was. The date of his employment by Welleyan Chetty is stated, the dates and times of plaintiffs alleged wrongful acts are stated and the court thinks he was sufficiently told as to the time when the complaint was made to the district judge.

The 3rd objection is "that the complaints of Madere Armogam and Welleyan Chetty are not transcribed and detailed."

The court does not think it necessary that they should be; for, considering as it does that the pleadings in this country ought to be more in the nature of pleadings in equity than at law and it not being usually allowed in an answer in equity to set forth deeds &c. in so many words but to give merely the substance (and if the answer does more than this it may be excepted to) the court considers that this answer in this respect is good. It clearly tells the plaintiff what the complaints were.

1. *Grant's Ch. Practice* p. 135.

The 4th and 5th objections are that the complaint of Domingo Ramenaden is not stated to be true and that the date of it is not given, it only stating in or about the month of February in 1846. For the reasons already stated the court thinks date is sufficiently stated and no further particularity would put the plaintiff in a better position.

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The defendants belief in the truth of this complaint is stated in the answer where defendant states "that he did compose and publish and cause and procure to be composed and published so much of the supposed libellous matter in the declaration mentioned as charges against the said plaintiff that complaints had been lodged against him with the district judge of Kornegalle which he 1st defendant believed would be substantiated."

The 6th objection is "that Jayetilleke's guilty knowledge does not appear" The court does not see the necessity of the guilty knowledge of Jayetilleke appearing, if it appears and is stated that the plaintiff against whom the alleged libel is written knew that the accusation of Jayetilleke was false.

The 7th objection is "that it does not appear that Jayetilleke knew the witnesses to be false." This for the reasons above explained is not necessary. The answer states that Jayetilleke made a malicious complaint and it will be sufficient in this case if it appears that the plaintiff knew the witnesses who supported it to be false.

The 8th objection is that it is immaterial that the Government Agent did not believe the witnesses, and the court thinks so too, and holds this objection such as it is to be a good one.

It is next objected that it does not appear with sufficient clearness in what proceedings plaintiff took a part. This objection is taken because the word "proceeding" is used instead of the word proceedings in the plural. Perhaps the latter would have been grammatically more correct; but it is evident that the proceeding referred to is "the said charge so maliciously and designedly brought."

The 10th objection is that the date and place of plaintiffs participation does not appear. Now the answer states that the "plaintiff did on divers dates (which are mentioned) at Kornegalle permit and suffer Jayetilleke and many of his witnesses to meet in the premises of the said plaintiff," and this statement the court thinks sufficient.

The 11th objection is that the place where the plaintiff permitted the witnesses to assemble is not stated. This the court thinks is stated when the answer states that the plaintiff did at Kornegalle suffer and permit the said Jayetilleke and many of his witnesses to meet in the premises of the said plaintiff."

The objection which follows next is that "it is immaterial that plaintiff aided Jayetilleke in the manner alleged, because it is not stated that plaintiff knew the prosecution to be false." This is an essential statement and the court holds the objection good.

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The 13th objection is that "it is not stated that Jayetilleke belonged to the conspiracy spoken of among the witnesses. The answer states that plaintiff suffered Jayetilleke and many of the witnesses to meet and assemble in the premises of the plaintiff where they unlawfully and maliciously conspired against the said John Paulus Casy Chetty." This appears to the court to connect Jayetilleke with the conspiracy. The word "they" referring as strongly as words can to Jayetilleke as well as the witnesses.

The 14th objection is that "even supposing Jayetilleke did belong to the conspiracy, the plaintiff's guilty knowledge is not shewn." Plaintiff's guilty knowledge should be shewn and this objection is therefore held good.

The objection next following in order is that "the date and place of the receipt of the £12 by the plaintiff is not stated." Here the date (15th October) is stated, but the place is not sufficiently specified, and the objection is held good.

The 16th objection is that "it is not stated that plaintiff knew why the money (the £12) was given to him." The answer states that the money was paid to the plaintiff by the said Jayetilleke and the others of the party conspiring against the said John Paulus Casy Chetty "for the purpose of paying" the said sum &c. to the Editor of the Colombo *Observer* newspaper to induce the said editor to take the part of Jayetilleke and the others against said John Paulus Casy Chetty. This the court thinks clearly sets forth not only that the plaintiff knew the purpose for which the money was given to him, but that plaintiff was to be the party who was to induce the editor to take the part required of him.

The 17th objection is that "it does not appear that Mr. Clay was guilty of any swindling transaction." Now though the leaving a place with a debt unpaid is not necessarily a swindling transaction, the absconding from a place to "evade paying a debt" is a swindling one. The answer states that plaintiff "wilfully" permitted Clay to "abscond and evade" the jurisdiction without recovering the debt, which the plaintiff could have done, and that Clay "being so permitted and suffered evaded and absconded" and left the island without paying the debt which he was able to do. Now reading the whole of this sentence together it states with sufficient clearness that Clay left the island knowing the debt was due and for the purpose of evading its payment.

The 18th objection is that the "fraudulent means whereby the debt was incurred are not stated." This is not necessary, the fraud being in the evasion.

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The 19th objection is that "only one swindling transaction is mentioned." This is a very frivolous objection, but it certainly is one and it can be amended with the rest of the answer.

The 20th objection is that the "plaintiff's guilty and corrupt motive in screening Clay does not appear." The court does not see how it can appear,—the defendant cannot investigate the plantiff's heart to learn the motives which actuated him.

The last objection taken is that "the simple plea of truth is no justification. Truth to be a justification must state and shew that it was uttered without malice and for a lawful purpose." This is a sound objection. It is not in accordance with any idea which can be found of natural equity, that simple truth which parades before the world delinquencies which may have been for years forgotten and which is only raked up for purposes of malice shall justify its publication.

The court has now gone through all objections raised in argument upon this demurrer and has given them the most serious attention, and although many of them may have been held good if it had been guided by the special and technical rules of pleading which prevail in England, (and they have been supported entirely by English common law authorities and the court will say most ably supported,) still our rules of court are framed for a far different kind of pleading, one far more simple and far better adapted to the circumstances of this country, and it may also be said to our local bar where a plaintiff can, as he has done in this case by retaining three advocates, monopolize the talent of the bar and secure the services of all the advocates who usually practice in the courts of Colombo. The court must repudiate, and it does now most strongly, a system of pleading (which is becoming too prevalent) and which in the present state of the island, instead of assisting the administration of justice, will become an engine of the greatest oppression. If however the judgment in this case does not give satisfaction to the parties, the court hopes that, as it is a most important case and one involving points hitherto undecided, it will be reheard in appeal before the collective court.

This is not a case of final judgment; in its present state this demurrer is in the nature of exceptions to a bill in equity where the defendant is allowed to answer over if necessary. The cases in which final judgment should be given on the allowance of a demurrer are where there is a demurrer to the libel or declaration and the defendant having admitted all the facts in it join issue upon some point of law.

It is therefore considered and adjudged, that the judgment of the district court of Colombo of the 27th day of April 1847,

be set aside and that the case be remanded to the said court with liberty to the 1st defendant, to amend his answer within fourteen days after this order shall have been received by the court below, and that as to costs of this demurrer in the district court that they should stand over, not to be costs in the cause, but to be decided at the hearing of the case and the costs of this appeal to follow the cost of the demurrer.

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Chitty's Index p. 932.
Atwood v. *Small*, 2 Y and J, 72.
Daniel v. *Bishop*, 13 Price 15.

D. C., Colombo, No. 3,652. *Umoor Catta* v. *Coonjie Musa*. July 10.

Carr, J.,—The order of the district court is set aside and the case is remanded back to the district court to allow a day to the defendant to summon his witnesses to prove the plaintiff's signature to the acknowledgment filed by the defendant; and both parties are to bear their own costs on the order of the district court and on this appeal.

When the plaintiff seeks for provisional sentence on the bond, or other instrument to which defendant does not acknowledge his signature, a further day is always allowed to the plaintiff to adduce the witnesses to prove the signature of the defendant thereto, and a similar indulgence ought to be allowed to the defendant to enable him to prove an instrument adduced by him as counter proof against the plaintiffs claim for provisional sentence upon its being denied by the plaintiff.

The practice at the Cape of Good Hope as stated at the bar is for the courts there, to always grant this indulgence to the defendant. And the refusal of it here would frequently entail great injustice or inconvenience and expense; for instance, the witnesses might be resident at such a distance that it would be impossible for them to appear on the day of showing cause, or if the plaintiff then acknowledged his signature, an unnecessary expense to the defendant as well as much inconvenience to the witnesses would be incurred by the latter being summoned to attend before the plaintiff had denied his signature.

The passage cited from *VanLeeuwen* p. 375 namely "whatever he (defendant) can allege against it, must immediately appear" has reference to there being no unnecessary delay, and also to the short and simple nature of the proof then allowed, such as the evidence of the attesting witnesses to prove the plaintiff's signature to the instrument that is produced in court for the defence, and denied by the plaintiff.

"Supreme Court Tuesday Minutes," 1847.

C. R., Jaffna, No. 2,607. } *Ibrahim* v. *Awokker.*

The commissioner suspected that this suit had been instituted on false grounds and dismissed it without hearing evidence.

The plaintiff appealed and *Carr C. J.* set aside the decision in these terms :—

The commissioner may possibly have well founded suspicions as to the truth of the plaintiff's demand, but he cannot prejudge the case thereon, without recording the examination of the parties or taking any evidence. The case is remanded back to hear the evidence and give judgment *de novo.*

Sept. 28.

P. C., Colombo, No. 7,672. } *Vanderstraaten* v. *Lister.*

Stark, J.,—This is an application in the nature of an appeal against a judgment of the police court of Colombo finding the defendant guilty on a charge of assault and battery and sentencing him to pay a fine of twenty shillings.

The grounds of appeal are various, but the main question raised is as to the powers and authority of the defendant, as head master of the Model School of the Colombo Academy, in "correcting misconduct and maintaining discipline" in the school.

The complainant was a scholar in the model school, and punished for disorderly conduct; and the police magistrate records as his opinion on the evidence, that "the conduct of the complainant, on his own showing, was very disorderly on the occasion in question, and quite subversive of discipline that must be maintained in well regulated schools, and that it would have been dereliction of duty on the part of defendant had he allowed the complainant to pass with impunity." The Supreme Court concurs in this opinion, but with this observation that the complainant was chargeable not with a single or specific act only, as the police magistrate supposes, but with a coure of disorderly conduct, and that the defendant was called on to maintain his authority against its continued resistance, amounting it would appear almost to defiance.

The maintenance of authority and discipline in a school are essential to its existence. And though no doubt, these may in many cases be maintained, and, when they so can, are best

maintained by moral means, the exhibition by the *master* of the kindly affections and all those moral qualities and personal habits, which growing up in return in the *scholar*, are at once the most favourable for the inculcation of instruction and the most valuable in after life, yet there are occasions on which, there can also be no doubt, other means must be employed; and the law allows whatever is necessary to attain the ends it sanctions.

" Supreme Court Tuesday Minutes," 1847.

Accordingly, not only may a father as respects his child, but likewise a master may as respects his apprentice, justify reasonable chastisement for correction; and it has been laid down that if a master, on correcting his apprentice, happens to occasion his death, the chastisement not being in itself excessive nor with an instrument either improper for correction or likely to endanger life or limb, it shall be deemed homicide by misadventure only, which is a misfortune but no felony. In like manner, the master of a ship may justify the punishment of a sailor. But a school master is more favourably regarded than either the master of an apprentice or the master of a ship, he having in fact the powers and duties of both combined; for he has the instruction and the improvement of the individual in his charge like the master with his apprentice, and he must maintain due order, discipline and subordination in the school like the master of a ship with his crew.

Whether in the present case where, as the evidence shows, the complainant was guilty of disorderly conduct in the first instance calling for correction, disorderly conduct in *resisting* the correction, and continued disorderly conduct in at length defying the master's authority and threating to leave the school and bring the case before the courts,—the defendant took the best possible course to maintain his authority in the school and to secure due discipline and subordination, the court is not here called on to determine. The court only finds that on the occasion in question it was necessary to correct misconduct and to maintain discipline and authority in the school, and that in the circumstances the measures adopted by the complainant for that purpose were not illegal. Indeed in all likelihood judging from the evidence, and the testimony of the Reverend principal of the Academy, they were absolutely necessary and required for the good of the school.

On these grounds it is considered and adjudged that the judgment of the police court of Colombo or the 2nd day of September 1847 be set aside and the same is set aside accordingly.

Note.—This case appears to he the first of the kind which bas been brought before the police court of Colombo. The Supreme

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Court hopes it will also be the last; and that both master and scholar in the Colombo Academy will bear in mind their mutual relation to each other so interesting and important,—the master that he has the character, habits and much of the future fortune of his pupil in his charge, the other that he is the pupil. And as to what the characteristic qualities of a hopeful scholar are we may find them from Socrates and Plato, that he should love learning, be willing to hear, and be ever bent on winning praise by well doing.

Oct. 5.

P. C., Galle, No. 4,740, } *Janchy* v. *Silva.*

Stark, J.,—The defendants are charged with having forcibly and unlawfully seized and taken from the prosecutor on the 27th July 1847 a leaguer of arrack containing 153 gallons of arrack while the prosecutor was removing it in a bullock cart from the distillery No. 72 at Hikcadoa, upon a permit from the arrack renter, marked 98 and dated the 20th July last, to the custom house at Dodandoa to be shipped to Madras, in breach of the 61st clause of the Ordinance No. 10 of 1844.

By the clause of the Ordinance here referred to, it is enacted that every officer of police and peace officer whatsoever, and every person acting in the aid of any such officer, and every other person who shall, under pretence of performing any duty or exercising any authority imposed upon or vested in him by this Ordinance, use unnecessary violence or wantonly do any injury or give uncalled for and vexatious annoyance, shall be guilty of an offence and be liable on conviction to a fine not exceeding five pounds or to imprisonment with or without hard labour for any period not exceeding three months.

The Supreme Court is of opinion that the offence here intended is abuse of power and accordingly that the words "pretence of performing a duty" &c. must be restrained to the excess which is made penal, and does not extend to the case of a person guilty of vexatious conduct but having no power to do the act in which such vexatious conduct is used. In the present case it is admitted that the defendants were not authorized to demand production of a permit for the arrack is question. Their conduct in the matter therefore, whatever it might be, could not fall within the purview of the clause founded on, as respects the 34th clause where authority to demand a permit is

pointed out; nor as respects the 59th clause which appears to contemplate only the case of forfeited spirits &c. contained in private premises, and not as here on the public road. "Supreme Court Tuesday Minutes." 1847.

P. C. Jaffna, No. 7,322. } *Gratiaen* v. *Cander* and others. "Supreme Court Tuesday Minutes," 1848.

Jan. 25.

STARK, J.,—The judgment of the police court of Jaffna is set aside.

If the defendants had a right of way to the temple, as alleged, they could justify, in trespass, their abating the nuisance by removal of any fence, wall, or other obstruction wrongfully placed across the way, by the complainant; and they cannot therefore be convicted under the Ordinance for unlawfully breaking down the fence without any evidence taken in their plea.

D. C., Colombo, No. 4,118. } *The Bank of Ceylon* v. *Arabin*. Feb. 15.

CARR, C. J.,—In this case the Bank of Ceylon have brought an action against one Arabin who resides in France to recover £21,404 18*s.* 7*d.* and have obtained an order from the district court that the service of all process in the case be made to F. Lock for and on behalf of the defendant, he being the agent in this country of the defendant.

Whereupon on the receipt of the usual summons, Lock appeared by his proctor in the district court and admitted the claim on which a writ of execution issued. When this came to the knowledge of the defendant, he denied the authority of Lock to confess this judgment and sent out authority to one Armand to take the necessary steps for setting aside the judgment admitted by Lock. Accordingly on 28th September 1847, Armand on behalf of defendant moved for a rule on plaintiff to shew cause why the judgment confessed by Lock and the writ of execution obtained thereon should not be set aside. On the 18th October 1847 the plaintiff shewed cause, when the district court gave the judgment now in appeal.

The question for the consideration of this court is—

1.—Whether this judgment confessed by Lock is null and void or not.

2.—Whether if it be a nullity, the decree of the district court in appeal in this case can be upheld.

"Supreme Court Tuesday Minutes," 1848.

As for the first point it depends entirely upon the extent of power given to Lock by the defendant Arabin From the documents filed and from the affidavit of Lock, it appears that he was only the general agent of defendant for the management of certain property. Lock in his examination states he never had any other power beyond mere letters of instructions which are before the court. Now it is a general principle of law that a principal is only bound by such acts of his agent as fall within the scope of the usual business confided to him, and it cannot be contended in the absence of any special power upon the subject that a special act like the present fell within the scope of the usual business confided to Lock. This court therefore considers that Lock had no power to confess the judgment in question, and that such judgment is therefore a nullity, and that consequently there is no judgment in the case against the defendant.

The judgment confessed by Lock being a nullity, the court comes to the consideration of the 2nd point, viz., whether the judgment being a nullity, the decree of the district court can be upheld.

The Supreme Court considers that the decree of the district court upon the rule in question cannot be maintained, inasmuch as the district court cannot open a judgment which is null and therefore not in existence, and the judgment upon which the writ of execution issued having been declared void the sequestration cannot stand.

So far indeed from Lock having had power to confess judgment in this case, the Supreme Court considers, upon the authority of *Smith* v. *Hibernian Mine Company*, reported in 1st Schoales and Lefroy page 238, that Lock was not in a situation to have been ordered to receive even process in this case, and if not *a fortiori* he could not confess judgment.

As to the costs, the Supreme Court considers they should be borne by the plaintiff.

It is therefore decreed that the judgment of the district court dated respectively the 20th May 1847 and the 22nd October 1847 be set aside with costs.

Feb. 29.

D. C., Colombo, No. 3,282. } *Aserappa* v. *Rodrigue.*

This is an appeal against the order of the district court dated 15th December 1847 for refusing to postpone a case on an affidavit that a material witness was absent. The plaintiff refusing to proceed, the case was struck off with costs which

the district judge declared, when on the next day the plaintiff moved to re-enter the case, to be a final disposal of the case.

"Supreme Court Tuesday Minutes," 1848.

The Supreme Court considers that with the affidavit of the materiality of the witness before it, the district court should not have refused to postpone the hearing of the case merely because there were other witnesses to the same point.

If the district court suspected the application was made for delay, it could have called for a fuller affidavit or have permitted the absent witness to be examined before judgment if necessary. The Supreme Court therefore thinks the motion for the postponement should have been allowed. As to the final dismissal of the case, the Supreme Court considers that if a party refuses to proceed with the trial when ordered by the court, the court very properly nonsuits him, which the district court has declared to be the effect of the dismissal of the case on the 15th December.

With reference to the affidavits that the district judge declared he would not postpone cases because the advocates were employed in the Supreme Court, this court has no right to expect the district court invariably to do so, as it would often have the effect of closing the district court for want of business to proceed with, but it feels that with such a limited number of advocates as there are practising in Colombo the district court ought upon such occasions and in difficult and important cases, which can hardly be conducted by the proctors, to yield to circumstances and allow a postponement.

It is therefore considered and adjudged that the judgment of the district court be set aside. Costs to be costs in the cause.

D. C., Galle, No. 11,303. } *Juanis* and others v. *Simon* and others — March 7.

Temple, J.—It is very difficult in this country where lands so much subdivided, to get all the parties before the court.

"If at the hearing of a cause it appears that the proper parties are omitted, it is discretionary with the court either to non-suit, or give leave for amendment, by adding the necessary parties;" 1. *Harrison's Chancery Practice* 76; but it is in this country the practice from the often impossibility of joining all the parties to give judgment for such portion only, as the plaintiff may prove himself entitled to.

"Supreme Court Tuesday Minutes," 1848.

March 18.

D. C., Colombo, No. 123. } *The Queen* v. *Cowasjee Eduljee.*

Temple, J.—The fir^t point which has been raised for consideration in this case is, whether the marginal notes on the survey can be received in evidence. This court considers these notes as only explanatory of the survey and therefore forming part of it.

The points then for consideration are,

1st.—Whether the verandah in question forms part of the highway?

2nd.—If it does, can defendant prescribe for it?

3rd.—Has defendant obstructed it?

This last is admitted in effect by the defendant.

Now as to the first point it appears that the verandah has not been included in any of the title deeds or surveys of the defendant's house since 1784, although in some of the later ones it is dotted off. In all of these deeds the wall of the house has been described as the limit, having for its northern boundary the high road. This is in itself conclusive that the portion occupied by the verandah forms part of the high road, but it is further confirmed by the facts that the verandahs in the street will be without a right line continued from the wall of the burial ground to the belfry, these being two ancient buildings. If then it forms part of the highway the obstruction of it is a public nuisance, which in no case can be prescribed for.

Another ground of objection relied on by the defendant is, that from the length of his possession of the verandah, a grant ought, both by Engligh and Dutch law, to be presumed. The Supreme Court however considers that such presumption cannot exist, as no grant can be made to divest the public of their right to a highway.

Augt. 15.

P. C., Colombo, No. 11,096. } *Gibson* v. *Silva.*

Oliphant, C. J.—The judgment and sentence of the police court are set aside. The question in this case is, did the defendant use a carriage for the conveyance for hire as a public business of any goods, or did he use a carriage for the conveyance for hire, *pro hac vice,* of any goods. If "as a public business" the defendant ought to have had a licence, if *pro hac vice* none was required. A certain

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obscurity may have crept into the ordinance by reason of the words "as a public business" being only understood and not expressed after the words "for the conveyance for hire" in the 3rd line of the 6th section. If these words are not to be supplied in the 6th section, then the intention of the Ordinance, as declared in the 2nd section, is completely altered, and every one hiring out his cart for a job, as to bring a load of bricks or remove earth from the foundation of a house, would be obliged to have licence, whereas the words used in the 2nd section are those constituting the definition of a common carrier in the English law. The defendant was a contractor with the superintendent of police to do a particular job, and he was not at the service of every individual who pleased to call upon him to carry for them, which is the case under certain restrictions with those who convey for hire as a public business, they being in fact carriers, and incurring the liabilities and responsibilities of that calling. Upon this ground the case is decided, but surely it is very questionable whether goods were carried. Can rubbish removed to be shut out of the way or burnt be called goods? Can a person carrying away a nuisance for which he receives a remuneration for his trouble be called a carrier? The court inclines to think these questions must be answered in the negative, but it serves no purpose to consider this point. The court is clear upon the other question.

D. C., Manaar, No. 4,637. } *Sleyma Lebbe* v. *Lebbe Tamby*. Oct. 14.

TEMPLE, J.—This is an action not to try right of property in the land in question, but to be restored to the possession of it. It is an action peculiar to the Dutch law by which a party, who has been interrupted in his possession, may be restored to it if he makes his complaint within a year, to be reckoned from the day of his having been turned out of such possession, but if he leaves the party who has turned him out in possession for a year, he loses his own right of possession, whatever such right may have been and he then retains only his right of action for the property. In the *viva voce* examination of the plaintiff it should have been kept in view that it was the right to possession, and not the title to the property, which was in dispute; and those questions only should have been asked which bear upon that point. But the questions which were permitted to be asked had reference to the question of title and ought not to have been allowed.

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Nov. 7.

P. C., Jaffna, No. 9,136. } *Armogam* & another v. *Wayrawn*. & others.

Temple, J.—Judgment and sentence set aside and case remanded to hear defendants' other witnesses, or such portion of them as the magistrate may see fit.

The police magistrate is not bound to hear a long list of witnesses when satisfied that the prosecution, or defence, as it may be, is false, but considering it possible that the first witnesses called upon whom reliance is placed may have been bought over by the opposite side, it is advisable that the court should have as much evidence as will preclude all possible doubt.

Nov. 21.

D. C., Kandy, No. 20,757. } *Supermanien* v. *Theodoris Appu*.

Temple, J.—When a rule *nisi* requires cause to be shewn upon a named day, as in the present case, the opponent should have the whole of that day, and therefore the rule cannot be made absolute until on or after the next day, and then or on some day afterwards a motion must be made to make it absolute or it would never be so. 3 *Chitty, General Practice* 576.

Dec. 5.

D. C., Colombo, No. 59. } *The Queen* v. *Sidemberem*.

Temple, J.—The judgment of the district court is set aside.

The accused brought an action against two defendants, of whom the first defendant was arrested in mesne process and being unable to give the required security, was committed to gaol on the 20th December 1847.

On the 2nd day of June 1848 the plaintiff (present accused) issued a summons upon the first defendant to appear and answer, he still being in gaol, the fiscal's officer to whom this summons was intrusted by the fiscal for service called upon the accused to point out first defendant (their being no order on accused to point him out) when the accused said he had gone to the coast. It is for this false information that the district court has found accused guilty of contempt—hence the present appeal.

In order to establish the charge of contempt against the accused and appellant, it must be shewn that it was the duty of

the accused to have pointed out to the fiscal's officer the abode of the party named in the summons. A contempt of court commonly consists in a party not doing what he is commanded to do by the court. But it is not to be deduced from this that a request made by a ministerial officer of the court is to be considered in the light of a command emanating from the court itself. In this case it was the duty of the fiscal to serve the summons upon the defendant and he might in so doing seek the assistance of the party upon whose motion the summons issued, but such party was under no legal obligation to afford him the required assistance and consequently the refusing to give information or even the giving false information would not be a contempt of the authority of the court out of which the process issued.

The attachment moreover against the accused for contempt should have been refused, it not appearing that the party sought for could not be served with the summons in consequence of the false information given by the accused, but on the contrary the party accused was at the time in the custody of the fiscal who could therefore have served the summons irrespective of any information received from the accused. It does not moreover appear that the party against whom the process issued, suffered any injury from the conduct of the accused. It was an unnecessary summons merely calling upon him to do that which he ought long before to have done of his own accord, namely, to appear and answer the plaintiff's claim and the service of it upon him would not have released him from gaol which could only have been effected by his either giving security or pressing on the suit and obtaining a judgment in his favor and neither would the non-service of the summons upon him have the effect of prolonging his imprisonment.

The Supreme Court for these reasons does not consider the accused guilty of a contempt.

D. C., Colombo, No. 6,119. — In the matter of the bankruptcy of *Francis Hudson* and others. *William Thompson*, appellant. — Dec. 29.

TEMPLE, J.—The order of the district court is affirmed. The question for consideration is whether the district court could order the assignees to pay the appraisers their usual expenses.

It has been contended that these expenses are to be paid

"Supreme Court Tuesday Minutes," 1848.

by the petitioning creditor and not by the assignees and that this order was improperly made, because no notice of the intended application to the court had been served upon the assignees.

The Supreme Court considers that the district court could make this order for payment of the appraiser's expenses upon the assignees.

There is nothing express in our local Ordinance as in the English bankruptcy act (which has been referred to in argument) to make the petitioning creditor liable for all costs and expenses incurred up to the appointment of the assignees.

The petitioning creditor is called upon to give security to indemnify the alleged bankrupt, should the act of bankruptcy &c. not be sufficiently proved and to make a further deposit to defray the costs of the proceedings, until the seizure of the bankrupt's effects.

The petitioning creditor appears to be released upon the fact of the bankruptcy being established, when the court issues an order for the appraisement of the bankrupt's effects which are handed over to the assignees upon their appointment, a provisional assignee being appointed in the mean time by the district court, should circumstances require. The assignees being entrusted with the management and disposal of the bankrupt's property, the court can make an order upon them for the payment of the appraisers.

D. C., Colombo, No. 8,161. } *Jumeaux* and another v. *Thompson* and others, assignees of the bankrupt estate of *Francis Hudson* and others.

Temple, J.—The order of the district court is affirmed. The district court made an order upon the assignees of the bankrupt's estate to pay to the appraisers a sum of money due to them for appraising the property of the bankrupt, this sum the assignees have refused to pay and the appraisers have in consequence brought the present action.

The question for consideration is whether this action can be maintained, or whether the plaintiffs are confined only to a more summary mode of obtaining payment.

From a perusal of all the numerous authorities which have been referred to in argument, the Supreme Court considers that an action is maintainable upon an order such as the present one which is in the nature of a final judgment being for the payment of an amount, which had a foundation prior to the order, and

not merely arising out of the decree. By this order a legal obligation has arisen upon the assignees to pay, which obligation is a sufficient foundation for this action. "Supreme Court Tuesday Minutes," 1848.

Cases cited: *Emerson* v. *Lockby*, 2 *H. Blackst.* 242, *Smith* v. *Wholly*, 2 *B. & P.* 422, *Fry* v. *Molaten*, 4 Taunt. Jr. 705, *Rome* v. *Green*, 2 Coup. 474, *Carpenter & Torn*, 3 Barn & Ald. 52, *In re Dillon*, 2 Schoales & Lef. 110, *Hartoss* v. *Jakes*, 2 M. & Sel. 438.

"Supreme Court Tuesday Minutes," 1849. May 19.

Petition of Bastian prisoner in the gaol of Galle.

OLIPHANT, C. J.—The Supreme Court is of opinion that petitions of appeal in cases of contempt of court are not required to bear any stamp, as the proceedings are in such cases of the form of those in criminal cases and such petitions have invariably been admitted without stamp.

P. C., Galle, No. 8,421. } *Babahamy* v. *Juan*. July 24.

TEMPLE, J.—The plaint is improperly drawn. The desertion charged, though it may have commenced six months ago, is a continuing offence and must be considered as repeated every day that it continues to exist. In the plaint the offence should be stated as existing on some date within one month previous to the day of lodging the complaint in order to bring the case out of the operation of the 22nd clause of the Vagrant Ordinance.

D. C., Kandy, No. 20,757. } *Supermanien* v. *Telenis Appu*, administrator. Augt. 7.

TEMPLE, J.—The order of the district court of Kandy is set aside.

The Supreme Court has already decided in this case on 21st November 1848 that a rule *nisi* should not be made absolute until after the day on which cause is required to be shewn, and then only upon a motion made for that purpose.

The district court of Kandy appears to have put an incorrect construction upon the 33rd clause of the first section of

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the rules in making a rule absolute on the return day, unless the opponent appears and moves for four days further time.

If this section is acted upon (which in some respects is different from the mode of applying for a rule *nisi* which prevails in English practice and is now generally adopted in this country) the Supreme Court considers that in no case should the rule be made absolute at once, but that if a party do not shew cause in the first instance, he should be allowed the four days provided by the rule, whether he appears and moves to that effect or not, and that the rule should not be made absolute until on or after the fourth day.

Oct. 30. D. C., Kandy. No. 18,818. } *Ponna v. Kirri Ukkoova.*

In this case the Supreme Court sees with astonishment that an advocate (Mr. Edema) has not only done the business proper to an advocate, but also that proper to a proctor, though he certainly does not charge the fees for the latter, and the court sees with equal estonishment that the district judge sanctions such mode of doing business in direct contravention of the 1st clause of the rule of court of 25th November 1835, which provides that no advocate shall be allowed to practise as a proctor. The Supreme Court trusts that such a course will not be pursued in future. However irregular Mr. Edema's conduct may have been, being an advocate he is entitled to the fees for the work performed by him in that capacity.

In considering the bill of costs and the taxation of the district court, the 1st item retaining fee, one guinea, is allowed on evidence being given that it was paid.

The 2nd item, consultation before advising defence, one guinea is disallowed, this evidently was only a conference with a client, which had Mr. Edema been a proctor would have been allowed to the extent of £7 according to the table of fees for proctors.

The 3rd item, advising defence, must also be disallowed altogether as payable by the plaintiff, but will be allowed to Mr. Edema as payable by the defendant, provided a written statement of the defendant's case be produced, in which Mr. Edema's opinion is requested whether the defendant have a good defence, with Mr. Edema's opinion advising the same subjoined, and then only to the extent of one guinea.

The 4th item, perusing signing and settling pleading, one

guinea must be allowed the work having been actually done by Mr. Edema, and such being advocate's work. "Supreme Court Tuesday Minutes." 1849.

The 5th item consultation upon evidence preparatory to trial, one guinea, must be disallowed as when an advocate is paid a fee for consultation, it is understood that there must be another advocate with whom to consult.

The 6th item breef fee on trial two guineas, must be allowed and therefore the bill as now settled will stand thus. [And the bill is given.]

P. C., Ratnapura, No. 1,376. } *Megnort* v. *Allie Pulle.* "Supreme Court Tuesday Minutes," 1850.

Augt. 31.

TEMPLE, J.,—The Supreme Court does not consider that a peon on the establishment of a district court is punishable under the 7th clause of the Ordinance No. 5 of 1841 for absenting himself from his duties without permission. A menial or domestic servant being one who lives under his master's roof.

D. C., Kandy, No. 23,468. } *Ossena Saiba* v. *Dawoodoo Saibo.* Sept. 17.

CARR, C. J.,—The Supreme Court has in a collective case in 1835 decided that the right of namptissement is not a matter of practice but of law—and that as forming part of the law of Holland at the time of the cession of the Maritime Provinces, it had been introduced into and might still be enforced within them, but at the same time the judges expressed a doubt as to whether this law existed in the Kandyan provinces. See Marsh. Dig. p. 434. No case having since occurred in which the correctness of these opinions have been questioned, the Supreme Court sees no ground to deviate from them or to hold that this law can be enforced in the present case.

D. C., Colombo, No. 12,977. } *Brair* v. *Prins* and others. Sept. 24.

CARR, C. J.,—The defendants were clearly entitled to appear gratis without being served with a summons. See *Fell* v. *Christ College*, 2 Bro. C.C. 278 and *Webster* v. *Threlfall*, 1

"Supreme Court Tuesday Minutes," 1850.

Sim. and St. 187. In the former case the LORD CHANCELLOR observed,—"I have no notion that a party made a defendant in this court, may not appear gratis, and get rid of the suit as soon as he can."

Nov. 26.

D. C., Galle, No. 11,008. } *Seneweratne v. Louis.*

CARR, C. J.,—That the order of the district court of Galle of the 5th day of November 1850 is set aside, and it is ordered that the bill of costs, which is complained of, be taxed by the registrar, and his report therein be transmitted to the district court. On complaints of exorbitant charges in bills of costs, the Supreme Court always exercises great vigilance as the charge affects the conduct of the proctors. Moreover, ignorant parties are so liable to be misled therein, from the proctors not objecting to each other's high charges, and therefore often know nothing about the bill of costs until execution issues for recovery thereof.

"Supreme Court Tuesday Minutes," 1851.

Feb. 11.

D. C., Batticaloa, No. 11,283. } *Sedeepady v. Nicholas*

CARR, C. J.,—The money is alleged in the libel to have been paid for the procurement of a place under Government, and the contract is an illegal one—so that plaintiff being in *pari delicto* cannot recover the money back from the defendant in this action on the ground of the defendant having failed to perform such contract, as the plaintiff is not entitled to the help of a court of justice therein; the rule being "ex turpi causâ non oritur actio," *Pickard v. Bonner*, Peake 221, Douglas 454.

Feb. 19.

D. C., Colombo, No. 13,135. } *Perera v. Siman Perera.*

CARR, C. J.,—The order of the district court of Colombo of the 4th day of December 1850 is set aside with costs and the plaintiff is ordered to amend the libel by setting out the particulars of the fraud, and also stating in what respects the

defendant, as an officer of the fiscal, had acted irregularly and contrary to the advertisement of sale. "Supreme Court Tuesday Minutes," 1851.

It is an intendment in law that a person is innocent of a fraud, and a public officer is presumed to do his duty, therefore the party insisting upon the contrary ought to state it fully in the pleading; moreover evidence should be admitted to prove only such grounds of fraud as are stated in the libel, 6 Pr. 240, 18 Ves. 302, Dan. Ch. 430.

C. R., Kurnagalle, No. 727. } *Perera* v. *Singo Naidi*. Feb. 19.

Carr, C. J.,—The plaintiff has no right to recover rent from the defendant for the use and occupation of the house in question, as it was built by him with leave of the owner, and the claim in the libel and the decree in the case No. 10,900 in the district court do not extend to the house which by the Kandyan law the defendant might still possess as having been built by him, although the owner recovered possession of the garden, and even on being ejected, he would still be entitled to remove the materials. See Armour 286. The parties must be referred to the district court to settle their mutual claims, as the court of requests has no jurisdiction therein, because the rights in future of the parties clearly will be bound by the judgment, even if the title to the portion of land on which the house stands be not still involved, with the right of way to the house. Upon the plaintiff bringing his suit in the district court, his title ought to be most anxiously and strictly scrutinized, as it appears that he claims by purchase from the former owner, who recovered the garden from the defendant in a suit, wherein the plaintiff acted as proctor, *Wood* v. *Donnes*, 18 Ves. 120; *Bellew* v. *Russell*, 1 Ball and B. 96; *Wright* v. *Prond*, 13 Ves. 138.

D. C., Jaffna, No. 4,347. } *Sidembren* v. *Ayenpulle*. Feb. 25.

Temple, J.,—By the Roman Dutch law parents cannot legally make a donation in favour of children who are still minors and under their tutelage, but from the statement of the assessors that such donations are made, it should be open for

"Supreme Court Tuesday Minutes," 1851.

the plaintiff, should he be so advised, to show at the hearing of the case that there exists a local customary law superseding the Roman Dutch law upon the subject. Vander Linden 214, Grotius 284, Voet B. 29 p. 5, s. 6, 1 Domat 186.

March 25.

D. C., Caltura, No. 10,028. } In the matter of the goods and chattels of the estate of *Don Philip Gonesekere Sinewe-ratne*, deceased.

TEMPLE, J.,—In this case the appellant has been attached and fined for an alleged contempt. Great delay having taken place on the part of the administratrix in settling the, estate the respondent one of the heirs moved the district court and therefore the fiscal was directed by the court in the following terms,—"To seize and sequester the houses, lands &c., and to retain and secure the same and also that you do prohibit restrain and prevent any person or persons from proceeding on or erecting any house or other buildings in and upon any of the garden &c., and to give due notice in writing or otherwise to all persons in whose possession or power such property of the estate shall or may be, requiring them to reserve and retain the same, and all issues, rents profits and interest according therefrom and to abide the order of this court"—no mention being made of any person or persons whom the fiscal was thus to prohibit and restrain.

From the fiscal's return it appears that he had prohibited the respondent who had erected a house in one of the gardens named in the order from proceeding on with any further works therein till further orders. But he had heard that since such prohibition the respondent had carried on certain additional works to the house he had erected by putting up a door and window shutters to it, and making the floor of clay and residing in it. For this alleged contempt the appellant Grebe has been attached and fined upon the motion of the respondent (Alwis, the heir of the deceased.) Hence the present appeal. The Supreme Court does not consider that the offence can be considered in the light of a contempt of court. The order is not an injunction from the court on the appellant enjoining him from doing certain acts the disobedience of which would be a contempt of court, but an order to the fiscal to sequester certain property and further to require the persons in whose possession such property may be to reserve and retain the same &c. It cannot therefore under such circumstances be considered a contempt to have put a door and windows to a house which he was thus directed to take care of.

C. R., Mallagam, No. 591. } *Vyravipulle v. Velyther.*

"Supreme Court Tuesday Minutes." 1847. May 6.

TEMPLE, J.,—The second defendant as the heirers of the deceased wife appeals upon the ground that she ought not to be condemned to pay the whole debt but only one moiety. The judgment does not entitle the plaintiff to recover the whole amount from second defendant. It complies with the prayer of the plaint and gives judgment for plaintiff against the defendants generally. The plaintiff therefore can only recover the debt in such a way as he is by law entitled to. The law upon the subject being as follows "although it has been agreed that every one of the debtors should be bound for the whole debt, yet it is nevertheless divided among them, and the creditor cannot immediately sue anyone of them for the whole debt, but before he demands from one the portions due by the others he ought to discuss every one for his own portion, and he may afterwards recover the portions of those who are not able to pay from the other remaining debtors." Domat p. 390, Bk. 3, Tit. 3, S. 1 Art. 3: Grotius p. 291. B. 3, C. 3, sec. 8.

D. C., Ratnapura, No. 107. } In the matter of the goods and chattles of the estate of the late *Game Ettegey Dingere Hamy* deceased. *Kanettegey Appoowa* and *Game Ettegey Appoa* v. *Megal Maselemanea Pulle.*

May 14.

TEMPLE, J.,—The order of the district court of the 26th day of March 1851 is set aside, and it is ordered that the several writs of injunction dated respectively 30th October 1850 and 8th November 1850 be dissolved, and it is further ordered that the administrator Megal Maselemanea Pulle to the estate of the late Game Ettegey Dingere Hamy do not sell any of the lands or houses belonging to the said estate without permission first asked and obtained from the district court of Ratnapura.

It appears that on the 30th October 1850 and on the 8th November 1850 Kanettegey Appoowa and Game Ettegey Appoa made application to the district court and obtained injunctions to restrain the administrator from selling certain lands which they alleged in their several applications supported by their own affidavits belonged to them respectively.

The district court granted these injunctions and subsequently on the 25th March the administrator moved the court to

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dissolve these injunctions, this motion was refused, and hence the case in appeal.

If the applicants for the injunctions had in addition to their own assertions that the land was theirs commenced proceedings to establish their rights, the district court could then have restrained the administrator from advertizing the lands for sale until the right was decided, but a mere assertion of ownership though upon oath is not sufficient to warrant the granting an injunction at all, more particularly an injunction like the present.

The Supreme Court would further remark that it is not in all cases necessary that proceedings should be commenced before an injunction can issue. For the district court can grant an injunction to prevent any irremediable mischief which might ensue before the party applying could prevent the same in its regular course. The Supreme Court feels the truth of the district judge's remarks as to the way in which administrators often dishonestly act under the presumed authority of the court and recommends, as a check to such proceedings, that in granting letters of administration the administrator should be forbidden to sell any of the property without the permission of the district court.

Sept. 23.

D. C., Chilaw, No. 14,526. } *Bawa Markar* v *Meera Saiboo.*

Temple, J.,—The order of the district court of Chilaw of the 8th day of September 1851 be set aside.

The Supreme Court has already by a collective decision dated 20th March 1848 decided "that looking to the general and extensive powers given under the 29th and 31st rules of court sec. 1 and the 14th clause of the Ordinance No. 12 of 1843, the mutual examination of the parties to a suit may be allowed at any time by the court if it thinks fit with all the latitude of cross examination."

The Supreme Court considers that in this case the required examination should be granted as tending to make the defendant better satisfied with the ultimate decision of the case if it should be against him.

D. C., Batticaloa, No. 11,446. } *Cungeoandepody* v. *Palen.* "Supreme Court Tuesday Minutes," 1851. Sept. 23.

Temple, J.,—The court should not stay proceedings on a second petition by a pauper until the costs are paid of a nonsuit in a prior case for the same cause unless his conduct appears vexatious, which under the circumstances it does not appear to have been. See Archbold Q. B. P. 1,124 ; 1 Harrison's Digest 1,858, *Hutton* v. *Colboy*, 1 Tidds. Practice 94.

D. C., Tangalle, No. 1,505. } *Nanhamy* v. *Dinekehamy.*

Temple, J.,—The appeal petition is rejected. It is the settled practice of the Supreme Court under a recent collective decision not to allow any pauper appeals unless on a report of there being a good cause for appeal by some other proctor than the one employed in the suit on the pauper side. It is obvious that a pauper may have good grounds to institute or defend an action in the court below, yet have no cause for appeal, whilst the proctor who has acted for him may be biased in favor of his client's cause.

C. R., Colombo, No. 12,807. } *Middleton* v. *Jansz.* Oct. 14.

Carr, C. J.,—It is too late to question the competency of any witness after the party has permitted the examination to proceed, as the court will not afterwards allow the objection to be insisted on, because the testimony turns out unfavourable; and even the discharge of the witness from the box is said to preclude further objection. Rosc. Ev. 116, *Fellinghnm* v. *Sparrow*, 9 Dow. P. C. 141. *Dewdney* v. *Palmer*, 4 M. and W. 664.

"Supreme Court Tuesday Minutes," 1852.

Feb. 3.

D. C., Kandy, No. 25,440. } *Halyburton v. Broughton.*

Stark, J.,—The order of the district court of Kandy of the 27th day of January 1852 be set aside with coses.

To authorise a warrant of arrest against a defendant as *in meditatione fugæ*, there must be a debt due or some enormous personal wrong done to the plaintiff by the defendant; and in the case of debt the plaintiff must aver that he does verily believe, and also show by the oath or affidavit of a third person, that he has good ground for believing, that the defendant intends to abscond or to leave the jurisdiction of the court.

In the present case the ground of belief as contained in the affidavit of Ensign Anderson is that, on a day not specified, at a conversation—the details or purport of which are also not specified,—in answer to a question asked, in words which the deponent doth not remember and cannot swear to,—from a person to the deponent unknown, the defendant said "in the Severn."

The Supreme Court is of opinion that there is here no ground whatever shewn by the plaintiff for his belief and that the application for the expression quoted both as regards time, place and person, as well as its meaning, are matters wholly of guess and groundless conjecture.

Moreover it does not appear that the defendant is personally known to the deponent, he is not once named in the body of the affidavit, or said to be known to the deponent who is not a permanent resident here, and consequently Ensign Anderson the deponent may be in a total and complete mistake as to the one, as he is by his own account ignorant of the other, of the individuals who had the conversation together in the druggists shop, on the occasion referred to.

Further, the Supreme Court is not satisfied that this is a case in which a warrant of arrest against the defendant as *in meditatione fugæ* could legally issue, because—1, there is no averment of any debt due to the plaintiff by the defendant, and 2, this is not a case of such enormous personal wrong done to the plaintiff by the defendant as to render the arrest of the defendant necessary for the purposes of justice. This is an action for words spoken of the plaintiff as it is alleged and concludes for pecuniary damages. No indictment would lie on the words, nor any punishment of the person as for a crime, and with regard to the conclusion for damages, it is impossible to say at this stage of the proceedings what, if any, may be awarded, or

on the other hand whether the case may not fail and be dismissed with costs.

"Supreme Court Tuesday Minutes," 1852.

The liberty of the subject is a precious right which should be preserved and protected with jealous care, and not interfered with but on clear grounds which do not exist in this case.

The Supreme Court has still further to remark a discrepancy in the affidavit affecting the identity of the deponent in the event of a prosecution against him: he is called in the preamble "Edward Anderson" he signs "E. A. Anderson."

D. C., Kurnagalle, No. 121. } *The Queen* v. *Kauralle.* March 11.

CARR, C. J.,—The conviction and sentence of the district court of Kurnagalle of the 12th day of February 1852 are set aside and the prisoners are acquitted. The court thinks that after the offenders have been prosecuted and convicted, any charge for compounding the offence could not be supported, *Rex* v. *Stone* 4 Carr 380 where it is said in the note "the offence against the public is not the taking of money, &c. from a thief, but the letting such a thief escape without punishment," and see 1 Russ. on Crimes by Greaves p. 132 (n. h.h.) and although the evidence may shew that the prisoners were present on the spot and there abetted the prosecutor in compounding the offence it fails to establish a conspiracy between them and the offenders.

D. C., Badulla, No. 121. } In the matter of the goods and chattles of *Mootoo Banda*, deceased. March 16.

CARR, C. J.,—It is ordered that the proceedings be remanded back for the appellant to give security in appeal.

The decree granting letters of administration to a party establishes the status of such party, and has often been held on appeal to be of a definitive, and not an interlocutory nature; and any alteration of such decree in regard to costs or in any other respect cannot be effected by appeal grounded upon an interlocutory motion at the trial, on which no separate order is made distinct from the decree.

Whenever a district court wishes to reserve to itself the further consideration of costs, it should expressly retain to itself in the decree a power to give further directions as to such costs.

"Supreme Court Tuesday Minutes," 1852.

March 25.

P. C., Galle, No. 13,946. } *Oedoema Lebbə* v. *Tamby Saiboe.*

CARR, C. J.,—The police court has no jurisdiction in the matter, as independent of the decision of the district court, it can issue no order for any boughs of a tree over hanging the complainant's house to be cut as being an annoyance to the prejudice of the complainant.

The 6th clause of the Ordinance No. 5 of 1846 applies only to common or public nuisances, or when the offence is made punishable criminally, but annoyances to the prejudice of particular persons only are not punishable by public prosecution as common nuisances, but are left to be redressed by private actions of the parties aggrieved by them; Burns J. tit. "nuisance" s. v. The Supreme Court cannot of course say how the right of the complainant may stand after the decree of the district court without seeing it, but ordinarily when trees are allowed to hang over a neighbour's ground, in such a case he may cut off the over hanging boughs. *Van Leeuwen* p. 202 s. 19.

Augt. 31.

C. R., Nuwera Eliya, No. 897. } *Don* v. *Bastian Perera.*

STARK, J.,—This is a suit brought to recover £2 14*s.* 8*d.* for beef sold and delivered by plaintiff to defendant on the 6th August and 28th December 1851, and to the plaint the defendant pleads that he did not buy on credit, but as plaintiff owed him money he bought beef, for that &c.

In support of his demand the plaintiff puts in a bill of particulars, but this being receipted thus "received payment J. H. Don August 2nd 1852," the court has at once given judgment for defendant.

It is clear however the receipt in this case cannot stand as evidence of payment so as to estop the plaintiff, or warrant a judgment for the defendant, there having been no delivery of the receipt to the defendant nor any consideration given therefor. Indeed the defendant does not rest on it, and his plea appears to be at entire variance with it. See Taylor on Evidence sections 205, 816 &c.

P. C., Galle, No. 14,943. } *Gun* v. *Sinho Baba.*

"Supreme Court Tuesday Minutes," 1852.

Sept. 23.

STARK, J.,—The charge in this case is "for smuggling the following goods viz. two boxes of tea and six boxes of toys from the steamer *Malta* lying in the harbour of Galle on the morning of the 13th August 1852, in breach of the Ordinance No. 5 of 1837."

There the clause founded on is not mentioned, nor the character or description of the smuggling intended specified. But it has been repeatedly held by the Supreme Court that where a prosecution is founded on a clause of an ordinance the charge should follow all the material words of the clause, which should also be distinctly stated. See the following cases.

Mallagam Request Court No.	230—14th June 1850.		
Negombo Police Court	,,	5,774—18th	,, ,,
Jaffna Police Court	,,	14,840—	,, ,,
Negombo Police Court	,,	5,293—	,, ,,

and the collective cases from Matara No. 8,427, 30th June 1852.

In the present case the charge does not specify the clause of the ordinance, and in none of the clauses referred to by the police magistrate, namely sections 8, 59 and 73, does the term used in the charge at all occur.

From the want of a specific charge also, it is doubtful on the merits whether the case against the defendants amounts to more than mere suspicion. For if the goods were not contraband, and this does not appear to be alleged, but goods which might have been lawfully imported paying duty, how, previous to importation, as in this case, can the smuggling by evasion of the duty be satisfactorily determined, and accordingly it may be questioned whether to satisfy the term "landing" in the 73rd clause, mere unshipment is sufficient.

Under all these circumstances and following the cases cited, the Supreme Court is of opinion that the judgment of the said police court of the 17th day of August 1852 should be set aside and the same is set aside accordingly.

D. C., Galle, No. 15,108. } *Candoe Umma* v. *Saripadien.*

Sept. 28.

STARK, J.,—This is an appeal against an interlocutory order of the district court that proceedings in the present case do stay until the first plaintiff has paid the costs in the suit

"Supreme Court Tuesday Minutes," 1852.

No. 14,122—in which latter suit she was sole defendant and decree went for the present first defendant, then plaintiff, with damages and costs.

The stay of proceedings till costs are paid may operate, and often does operate, as a security for the payment of such costs, but a great object in view also is to prevent the vexatious accumulation of costs upon a party touching a matter which has been or might have been fully heard and determined.

The present case however does not fall within the scope and purview of the rule, as here there is no such accumulation of costs on the same party, the costs in question being due by the first plaintiff in a suit which was brought against her by the present first defendant. Nor is there any ground so far as appears to consider the present action at her instance with others as vexatious.

The stay of proceedings in this case would also operate injuriously as respects the co-plaintiffs who are not liable in the costs in question.

It is also by no means quite certain that the lands in question in the two suits are one and the same. Order of the court below set aside.

Oct. 19.

D. C., Galle, No. 14,919, } *Allima Umma* v. *Silva*.

Carr, C. J.,—The Supreme Court cannot find any special clause or power in the will to the effect stated in the petition of appeal, but as the contract with the defendant was made by the plaintiff (executrix of the estate of Sekady Markar solely and the rent payment thereunder is reserved to her alone, she must be considered as having made the contract on her own account and intending to administer these assets without her co-executor. The action therefore must be brought by her alone, as the contract is incapable of being adopted by the co-executor, the plaintiff not having contracted both on her own account and as agent of the co-executor, or generally on account of the estate with the view to the interference of the co-executor, in case he should choose to take a part in the management of it; see *Heath* v. *Chilton* 12 M. and W. 603, 13 Law J. 225.

D. C., Colombo, No. 16,732. } *Gerard & Brown* v. *Fulton.*

"Supreme Court Tuesday Minutes," 1852. Oct. 19.

Carr, C. J.,—The order of the district court is set aside, but the costs are to abide the result of the action.

The court intimated its opinion upon the hearing of the arguments of counsel, that as the proof which is wanting to shew the liability of the defendant to pay the amount of the note, forms an essential part of the plaintiffs' case and is not evidence to be adduced on the defendant's side, the plaintiff is not entitled to the provisional sentence claimed; as he ought to shew thereon a clear *primâ facie* right to his demand, the case of *Randall* v. *Haupt* decided by the Supreme Court at the Cape of Good Hope, which has been cited by the defendant's counsel and a copy whereof is annexed to this judgment, appears to be in point and in support of this view. The court however has delayed the judgment until it could confer with the chief justice on the Dutch law, who concurs in this refusal of provisional sentence.

Randall v. *Haupt.*

The plaintiffs in this case claimed provisional sentence against the defendant on a promissory note made by one Mitchell in favor of the defendant and by him endorsed to Randall and produced the bill which was dated 3rd October 1843 payable six months after date *i. e.* 3rd April 1844. Produced also a notarial protest for non-payment by Mitchell's trustees (he having become insolvent and his estate placed under sequestration) when presented to them on the 6th of April and of the due intimation of such dishonor to defendant on the same day.

It was admitted that the 5th April was Good Friday.

The attorney general for defendant pleaded want of due negociation in respect that the bill had not been presented on the 3rd.

Mr. Ebden in answer maintained that the insolvency of Mitchell, the maker of the note, relieved the holder from the necessity of presenting the bill to Mitchell or his trustees for payment when due. Secondly, that presentment on the 6th April was due presentment. Thirdly, the presentment had been made within the days of grace. Fourthly, he tendered an affidavit to show that verbal intimation of the dishonor had been given to defendant tempestim and that he had undertaken to pay the note.

"Supreme Court Tuesday Minutes," 1852.

The court (Menzies and Musgrave J. J.) refused to allow the affidavit to be produced and quoad ultra ordered the case to stand over until the first provisional day in next term, in order that the bench might be full.

POSTEA, 1st August, 1844.

After hearing Mr. Ebden.

The chief justice stated that he concurred in the decision of the court, refusing to allow the affidavit to be produced.

Mr. Ebden then proceeded to argue in support of the 2nd and 3rd propositions maintained by him. On the 3rd point quoted Wissee Recht. p. 66.

The attorney general contro quoted Chitty on bills p. 264, 2nd ed. Vander Linden's Just, 690. Thomson on bills p. 806 and maintained that if there were any days of grace in this colony, they must be the days of grace recognized by the laws of Amsterdam being six days, in which case the presentment of the note would have been made too early, and therefore bad, consequently, in that case there would not have been such due negociation as would render the endorse liable.

The court held that there are no days of grace recognized in the law of this colony—and that presentment three days after the note became due, was not due presentment and, consequently that there was no evidence before the court of any facts which would render the defendant as endorser liable, and therefore refused provisional sentence with cost.

Nov. 16.

P. C. Kalutara, No. 7,996. } *Cokay* v. *Fernando.*

CARR, C. J.,—The 40th clause of the Ordinance certainly states that the license shall be in force "*on* and from the day" on which it shall be granted, but the same clause previously provides that it shall not be lawful for any person to draw or cause to be drawn any toddy " unless he shall *first* have obtained a license" and the whole clause must be construed together. It is true that the law does not in general allow of the fraction of a day, yet it admits the day to be divided in cases where it is necessary to distinguish, or to answer the ends of justice ;—Com. Digt. *Cooke* v. *Sholl*, 5 T. R. 255 The Supreme Court therefore considers that the license subsequently obtained on the evening of the same day will not legalize the drawing of the toddy in the morning there

of previously to such license being issued, and that any other decision would tend only to promote fraud on the revenue by not giving a due construction to the whole provisions of this clause. "Supreme Court Tuesday Minutes," 1852.

P. C. Negombo, No. 9,340. } *Christiansz* v. *Fernando* and five others. Nov. 23.

Temple, J.,—The judgment of the police court of the 26th day of October, 1852 should be set aside and the same is set aside accordingly, and the defendant is acquitted, upon a charge of theft. "If there be any fair claim of property or right in the prisoner, or if it be brought into doubt at all, the court will direct an acquittal—2 East P. C. 659." In this case the coconuts were taken from a garden, which belonged jointly to the prisoner and his brother—any division thereof that may have subsequently been agreed on between them, could not in law be binding, and debar the prisoner, as a joint owner from disputing it, and asserting his right to a share in the whole, unless such division was effected by a notarial deed, and an adverse title of ten years exclusive possession of the divided portion in dispute could be shewn.

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1846—1852.

D. C. Galle, No. 10,965. *Jayewardene* v. *Cripps.*

"Supreme Court Collective Minutes," 1846.

Nov. 28.

Morgan for appellant, *Selby* for respondent.

Per CARR, A. C. J., STARK, J., TEMPLE, J.,—The district court is vested with a discretionary power of ordering the attendance of a party to be examined or not as it may consider the examination to be necessary and looking to the reasons given by the plaintiff for requiring the defendants' examination in this case on the renewed motion and before this court, there appears no sufficient ground for the same.

This court is moreover of opinion that the appeal from that interlocutory order did not preclude the district court from proceeding on to trial, as fixed for the *next* day, although the general rules and orders require the transmission of records in appeal with as little delay as possible.

Voet says Lib. 49 Tit. 1. c. 8 "non enim apud nos per appellationem ab interlocutoria impeditur ulterior cognitio judicis inferioris circa causam principalem, pendente super interlocutoris appellatione"—and in courts of Equity in England the general rule is that an appeal does not stay proceedings without a special ground and order ;—*Gwynne* v. *Lethbridge,* 14 Ves. 585, *Hugnenin* v. *Basley,* 15 Ves. 180 and seq,. 16. Ves. 213 and 216. *Wood* v. *Milner,* 1 Jac. and W. 636 and *King of Spain* v. *Machada,* 4 Russ. 560.

But with a view to maintain a uniformity in the practice of the courts on this matter, the Supreme Court is of opinion that the principle which appears to be laid down in Sir Charles Marshall's notes p. 13 should be adhered to, namely, that where the justice of the case requires the immediate settlement of the point or points raised in any interlocutory order, the proceedings should be stayed to allow a judgment on the appeal therefrom.

The present decree however cannot be supported, as it is not only founded on an erroneous view of the law of evidence —See Phil. Ev. 2nd vol., p. 299—but because the district court ought to have allowed the plaintiff's motion for a postponement of the hearing, upon his affirmation that three of his material witnesses to prove malice were absent, inasmuch as without express evidence of this nature, the plaintiff could not safely proceed to trial, although he should succeed in giving sufficient secondary evidence of the letter in question which he was entitled to do.

Both appeals having been brought on at the same time, and the question raised in them being in some measure of unusual occurrence in the district courts, the costs of the appeals are ordered to be costs in the cause.

"Supreme Court Collective Minutes," 1846.

Dec. 23.

D. C., Kandy, No. 6,108. } *The Queen v. Habeboo Mahamadbo.*

CARR, C. J., STARK, J., and TEMPLE, J.,—The court is of opinion that this case should go back for further investigation, the crown having sufficiently proved its right to the land to require the defendant to rebut it by some evidence either,

1st.—Of his having a probable claim or pretence of title to the land, or else,

2nd.—Of his having cultivated, planted or otherwise improved or held possession thereof for the period of five years.

In the argument of this case, the Deputy Queen's Advocate relied much upon "the prerogative right, on an information of intrusion, of putting the defendant on shewing his title specially," Chitty Prer. p. 333—but it appears to be unnecessary for the court to decide that important question, of how far this prerogative right extends to, and can be enforced in the old Kandyan districts, because it is clear that this Ordinance has prescribed a different mode of proceeding in summarily proceeding under it for obtaining the possession of Crown land encroached on.

Looking to the provisions of the Ordinance respecting the information, and the affidavit in support thereof, it would seem that both need only charge a person or persons with having without probable claim, or pretence of title entered upon or taken possession of any land belonging to Her Majesty, Her heirs and successors, and therefore that the Crown need adduce evidence only to that effect, as according to the general rule the complainant is required to prove only material and necessary averment in the libel or information, and any matter of jurisdiction should come from the defendant—but the legislature in this Ordinance has thought proper to specially declare respecting these informations for petty encroachments, that "in case on the hearing thereof it shall be made to appear by the examination of the party or parties, or other sufficient evidence to the satisfaction of the district court," (Ord. 12 of 1840, cl. 1.)

1st—that the party had entered or taken possession, without any probable claim or pretence of title,

2ndly—that such party had not cultivated, planted or otherwise improved and held uninterrupted possession of such land for the period of five years or upwards, "then and not otherwise," the district court may order the defendant to deliver up possession. Now as the district court is authorized to proceed in the absence of the defendant, and in such event it is not declared that less evidence would suffice, the court is of opinion that as the district court can give no judgment in favor

of the Crown without sufficient evidence had before it upon the above two points, it follows necessarily that the *onus probandi* in these summary proceedings lies on the Crown to adduce *primâ facie* evidence on both these points.

"Supreme Court Collective Minutes," 1846.

In the present case the court is of opinion that the Crown has adduced such evidence and that although not free from discrepancy and objection, and liable to be wholly rebutted also by proof on the defendant's part, the evidence, as it stands, sufficiently proves the land to belong to Her Majesty and to have not been cultivated or possessed for five years, so as to call on the defendant to rebut such proof, and on his failure to do so, to adjudge the defendant to deliver up to Her Majesty the peaceable possession of the said land.

The evidence of the Lekame that he possesses a Government paddy field to which this land is an appurtenance might be especially noticed on this point, and his not having taken the produce of his land for twenty years, (though claimed by him), and its not having been cultivated for that period, tend to shew that it must be considered as chena or waste land, which under the 6th clause belongs to the Crown until the contrary be proved.

Then as to the possession for five years and upwards. It is in evidence that the Lekame never gave the land to Pitchie (the alleged vendor to defendant) or to the defendant; that Pitchie built a hut thereon about three years before the defendant, that he never lived in it, and it stood only for a year; that the defendant built his house 6 or 7 months ago, and that at the time the defendant was building the house, it was waste land, and the Koralle then told him that it was Crown land. As to the coffee bushes existing here and there on the land, they may have been sown by the birds or put in when the hut was built by Pitchie and abandoned therewith; and without any proof of their being planted, their age, culture, or exclusive possession of the produce thereof, the court cannot consider them a sufficient evidence of the garden having been planted, improved or cultivated for the period of five years within the Ordinance.

The only remaining point is the defendant having "a pretence of title" under the deed B filed, as held by the district judge—but whether he has or not, still remains to be proved in the opinion of this court.

No evidence has been taken yet in support of the deed itself, and although the Deputy Queen's Advocate has for the sake of argument (to get the opinion of the court as to the effect of such deed being produced and proved in evidence)

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admitted it, the court considers such a deed being proved, when viewed as it ought to be with all the other facts and circumstances in evidence before the court, ought not to be in itself held "a probable claim or pretence of title" within the true meaning and construction of this Ordinance without some further proof of title by the defendant.

"*Probable*," is that which has more of evidence for than against it; which is more likely to be true and substantial, than false and unfounded; and a majority of the judges think that "probable" appears in this sentence to be equally applicable to "claim," as to "pretence of title" because the latter cannot be construed in its bad sense. It is a general rule that where the title to property comes in question, the exercise of a summary jurisdiction by a justice of peace is ousted, see Burns J. vol. 1 p. 833 title "conviction," but it is also held that this rule ought not to be so extended as to enable an offender to arrest the summary jurisdiction by a mere fictitious pretence of title or an assertion of right, where the party's own shewing, or other manifest circumstances, proved the claim to be groundless. The whole sentence ought moreover to be taken together and judged by its context, and then the words "probable claim or pretence of title," will amount closely to "colourable title."

In *Hunt* v. *Andrews*, 3 Barn: and C. 346, which was an action for a penalty—Chief Justice Abbott said "it has been "held however in an action brought to recover a penalty, it "is sufficient for the defendant to shew that he was acting "under the appointment of a person who has a reasonable "ground of title to the Manor, for that is what I understand "by the words, *colourable title*." So in a similar case, *Rushworth* v. *Craven Maclell*, R. 422 Baron Graham said, "but the court "requires the party to shew some *colourable title*, that is, as I "understand it, some *primâ facie* evidence affording a fair pre-"sumption of title in the person claiming it," and in the first mentioned case the court held that proof of a deed of purchase reciting prior deeds of conveyance (which were not produced with it) did not shew a colourable title, when viewed with evidence of title from the opposite party repudiating such colourable title, and having a tendency also to prove that the party claiming a right ought to have known and must have known that he had no title whatever.

In the present stage of this case, the court can in justice to the defendant express no final opinion whether he has or has not *bonâ fide* a colourable title. It considers the case to have been wrongly stopped, and that the district court should have

called on the defendant for his defence, and the judgment is accordingly set aside, and the case remanded back for further investigation.

D. C., Batticaloa, No. 9,523. } *Godinho* v. *Mrs. Koning.*

Buller for the appellant.

CARR, C. J., STARK, J., and TEMPLE, J.—The Supreme Court is of opinion that according to the prevailing law and usage of this colony, deeds in this form "*ad pios usus*" are valid, and that the plaintiff as the "Roman Catholic Missionary at Batticaloa and the manager of the Church and property thereof," can maintain this action on such deed, if duly proved.

The statutes of Mortmain do not extend to the colonies of Great Britain, see 2 Burge C. L. 458, *Attorney General* v. *Stewart* 2 Ms. 143, and the Dutch laws restricting donations of this description, (Voet. Lib. 18, tit. 1 and 11, 2 Burge C. L. 455 Van Leeuwen p. 266) do not appear to have been acted on or enforced by the English Government in this island (see Reg. 4 of 1806.) By the Kandyan proclamation all donations and bequests of land however to the use of any temple "whether vihare, dewale or otherwise" are restrained without license from the Governor, and from the recital it appears, that it was theretofore customary for such donations to be made with the consent and license of the Sovereign's authority. But the Ordinance (commonly called the Mortmain Ordinance) No. 2 of 1840 for extending throughout the island these provisions and to restrain gifts or dispositions of lands for religious or charitable purposes," was disallowed by Her Majesty.

From Viner's Abridgment Tit. "Grant" (A) 4, it seems that in ancient times a grant "Deo et Ecclesiæ," was good, or if a man gives "lands per dedi et concessi ecclesiæ de D"—" this goes to the person and his successors, and this construction now prevails in wills where the intention only of the devisor is regarded and it will therefore suffice in wills, if by the description the meaning and intention of the devisor is apparent, thus a devise "Ecclesiæ sancti Andreœ de H" would be a good donation by will to the corporation of the person of the said Church; and his successors, for such description was sufficient in a "will to express the person of the Church and his successors, because though not named in the devise, yet he was comprehended in it." Powell on Devises vol. 1 p. 338, 10 Co. R. R. 57, 6. In the Dutch Civil law, the technical distinction of the English law

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in construing deeds and contracts differently from wills, is not recognized, but the intention is preferred, Vand: p. 192; a deed therefore is not avoided by any misnomer of the donee, provided the intention appear sufficiently clear and certain.

The decree of the court below must be set aside and the plea overruled with costs, and the defendant is ordered to answer within such time after this order shall have been notified to her as the district court may appoint.

D. C., Kandy, No. 17,313.

Per Curiam :—The interlocutory order is affirmed. The Supreme Court is of opinion that Indeevellegodde Unnanse cannot, until he be substituted in the place of the late defendant by an order of the district court, maintain any motion to set aside the present sequestration as irregularly issued or enforced, because he has no "persona standi" in the cause to do so.

Upon enquiry the Supreme Court finds that it has been wrongly stated at the bar, that it is the prevailing practice in the district court of Colombo not to revive a judgment unless execution has not been taken out under it for a year.

Any such practice would be irregular. Vand: p. 423 in speaking of "citations to hear such execution decreed" says "this takes place 1st when the decree or sentence of which the execution is sought has become superannuated &c." And 2ndly when the party condemned is dead, or by being placed under curatorship has lost the "legitima persona standi in judicio." In this case the decree, before it can be put in execution, must be declared executable against the heir or curator,—and see also Vand: p. 428, Grant C. P., vol. 1, p. 161, *White* v. *Hayward*, 2 Ves. 462, 1 Mer 154—and the Supreme Court therefore sees no ground to dissent from its former order requiring this case to be revived.

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D. C., Galle, No. 11,238.

Per Curiam.—The decree of the district court of Galle of the 31st day of July, 1845, is set aside and the case is remanded back for hearing on evidence, and to give judgment *de novo.*

According to the Moorish law, the age of majority is attained after the expiration or at the completion of the 16th

year. Hedaya 3 vol. p. 482, Macnaghten's M. L. ch: 8 p. 62, and by the Dutch law the parental power ceases by tacit or indirect emancipation, when the children with the previous knowledge of the parent take up residence elsewhere and exercise openly any trade or calling, Vand: 96; Voet: lib. 1 tit. 7. 12.

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As the plaintiff appears to be 19 years of age, and is openly carrying on trade in a separate house of his brother on his own account, with the knowledge of his parents, the court thinks that he must be deemed to be no longer under the parental power, and that, although he has continued to reside with his parents, that circumstance alone affords in this island no reasonable presumption to the contrary in the case of a young moorman, who has already attained his full age of majority according to his own laws, and is trading separately on his own account, because the custom of the Moors and natives in this colony is for the whole family to continue thus to reside together in the same house until the marriage of the children—and even afterwards.

D. C., Negombo, No. 1879-11,388. } *Buller, Q. A.* v. *Sadris Mendis.*

Morgan for appellants.

Per Curiam:—The Supreme Court is clearly of opinion that this is not a case for the summary proceeding under the Ordinance No. 12 of 1840, and that the district court ought not to have made any order thereon against the defendants to deliver up possession of the lands mentioned in the information, because the proof of the long cultivation thereof by the defendants, and the payment of the tax of one-tenth for the same according to the rate payable on private lands, and also the old deeds adduced in their favour, sufficiently shew such *primâ facie* title in the defendants, as amount to "a probable claim or pretence of title" under the Ordinance. The district judge, moreover, ought not thereon to have proceeded to decide under these summary proceedings, whether upon the true construction of an old deed apparently genuine, and where possession has accompanied it, the original grant was absolute or conditional only; and whether any condition contained therein had been since duly fulfilled or not by the grantees.

set aside.

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Dec. 4.

No. 6. } *The Queen* v. *Harmanis de Soyza.*

Wilmot for prisoners.

The Acting Queen's Advocate for the crown.

Per Curiam:—The motion in arrest of judgment is overruled, as the indictment is sufficiently supported by the evidence adduced. It appears that the words "notarial instrument" occur before the purport of the instrument is set out, and being matter of inducement, the record would have in England been ordered to have been amended by striking out the word "notarial," see 2 *Russ C. P.* 798—9 and note (9), and whenever such amendment is allowed, the Supreme Court would reject the words as surplusage; as although the court has by its rule of the 6th of December, 1845, ordered that no objection shall lie to the form of any information in any case where such objection would not be allowed by the law of England upon any indictment, it has never gone on to further declare that all objections, which are valid by the law or practice of England shall be equally allowed here. On the contrary, the Supreme Court has always mainly on such technical objections to see whether the information stated the offence with sufficient clearness and certainty for the prisoner to know the crime with which he was charged and to be able to make his defence to it; and in this case the information can leave no doubt as to the nature of the instrument, viz: that it purported to be a deed of sale of the garden mentioned therein, but was incomplete for want of the due attestation of a notary, the gist of the offence laid therein being that the prisoner in his office of notary had fraudulently omitted to seal and sign such deed of sale.

Dec. 11.

D. C., Batticaloa, No. 10,443. }

Por Curiam:—The decree in this case is set aside and the case remanded back for further enquiry and for give judgment *de novo*.

It is very probable, for the reasons ably stated by the district judge, that the parties in framing the instrument did not intend to restrict the first and second defendants from disposing of the garden by mortgage or sale only, but if the court were bound to look to the deed alone, it would not possibly hold that the legal effect of the express prohibition therein

against mortgaging or selling, extended also to debar the donees from making any gift, exchange, or other alienation of the said garden. On the contrary, the Supreme Court would be inclined to consider that in an ordinary grant, the condition would be wholly void as annexed to an absolute gift—but as the document on the face of it is a gift or dowry, another independent question must necessarily arise thereon, which may affect the transfer of this garden between the defendants, viz: whether by the general customary law of dowry prevailing at Batticaloa, the husband cannot even with the consent of his wife give away the whole of her dowry property to the sister of the husband, and also if a married couple die childless, the dowry property does not by such law devolve on the donors or their heirs. This court has on a previous occasion in reference to the wife's property had to notice the analogy between the Thesawalame or customary laws of the Tamils at Jaffna, and the customs prevailing at Batticaloa, and has referred the case back accordingly for inquiry as to the latter (appeal No. 2,942 Batticaloa, 11th November, 1835, and *Sir C. Marshall's Digest*, pages 266 and 94, and 222,) and believing, as the Supreme Court does, that the decision of the district court has met the real justice of the case, it is only desirous to have such decree established on its proper legal grounds.

D. C., Colombo, No. 31,535. }

Dec. 29.

Per Curiam:—The acting chief justice having consulted the other judges, it is ordered that the petition of the second defendant praying for leave to appeal in the above case from the judgment of the court below be rejected.

The judgment of the district court, sought to be appealed from in this case, was pronounced on the 30th April, 1841, and an appeal was lodged against it by the defendant, but that appeal was withdrawn by the defendant's proctor on the 31st December in that year, and the present application was not made until after the lapse of more than six years and a half after the withdrawal of that appeal. The only ground on which this application is founded is a mistake in law in the judgment, and it is not alleged that there has been any fraud in the case, or that any evidence has been discovered since it was decided, and the plaintiff, who was a purchaser, completed the transfer of the property in question after the action was brought.

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It may also be urged that although the general law is as stated in the opinion of the advocate for the petitioners, yet there are cases shewing that agreements restricting redemption to time certain are good, if between members of the same family, as the mortgagor might thus intend to benefit the mortgagee; see *Bonham* v. *Newcomb*, 2 Vent. 364, 1 Powell, Mortg. 128.

The Supreme Court has also to record that it is not satisfied as to the petitioner's poverty and the other alleged excuses for delay.

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March 20.

D. C., Kandy, No. 20,044.

Per Curiam:—The interlocutory decree is affirmed, but without costs, as the practice in the Colombo district court has been to disallow such examination previous to issue being joined, which may have led to the objection being raised in the present suit.

The Supreme Court is of opinion that, looking to the general and extensive powers given under the 29th and 31st rules of court sec. 1 and the 14th clause of the Ordinance No. 12 of 1843, the mutual examination of the parties may be allowed at any time by the court, if it thinks fit, with all the latitude of cross-examination, and that the practice ought not to be restricted to after issue having been joined.

The court is confirmed in this view by reference to the report of the commissioner, Mr. Cameron, who in his 4th recommendation suggests that "the pleadings shall consist of an oral altercation between the parties in open court," and in his 6th recommendation, "that each party shall be subject to cross-examination by him in pleading, and as to those relating to evidence" and in the reasons alleged for such recommendation he observes "the pleading, if it is to be of any use at all, must take place in his (the district judge's) presence. The parties must be examined by him, and cross-examined by each other." And Lord Goderick remarks thereon in his despatch accompanying the charter, "I entirely concur in the 6th recommendation respecting the mutual examination of the litigant parties by each other. In our own courts, the principle is admitted, although the method by which effect is given to that principle is so circuitous and costly, as to have deprived it of much of its real value. Suitors in our common law tribunals can examine each other only by commencing new

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suits for that purpose in the Court of Equity. If the object itself be desirable, I can discover no reasons why it should not be effected in the direct and simple form which Mr. Cameron has proposed." Thus bills of discovery of facts resting in the knowledge of the person against whom the bill is exhibited, or of deeds, writing, or other things in his custody or power, are used commonly to enable the plaintiff to prosecute or defend an action at law which may either be pending or intended.—*Mitf*: *Plead*: 33, 52, and 5 *Mad*: 18.

D. C., Jaffna, No. 1,601. *Casinader* v. *Raymond*. March 20.

Carr, A. C. J., Stark, J., and Temple, J.—The decree is reversed and the plaintiff's case is dismissed with costs. The decision in the former case merely annuls the fraudulent sale of the one-third to which the plaintiffs are heirs, but is silent as to the relative rights of the plaintiffs and their mother. Under the Thesawalame, the plaintiffs could not claim the profits till their mother's death, and by the Roman Dutch law the better opinion is that the usufructuary does not forfeit his usufruct by attempting to alienate the property; although there is one case to the contrary, where a father having the guardianship of his children and a usufruct in their estate, mortgaged it. "But it has been observed that this decision rests on the particular circumstances of the case, and is not sanctioned by any text of the civil law, or by any municipal law of Holland." *Van Leeuwen* 142, 3 Burge. 157, Voet, Lib. 7, tit. 4, n. 4.

Queen v. *Dingy Appu*. 17 June.

This was a case of murder. Upon motion in arrest of judgment,—*per Curiam*:—The court are unanimously of opinion that the evidence of Lokuhamy, one of the witnesses examined for the prosecution in this case, was inadmissible: she being the wife of the prisoner, according to the custom of the Sinhalese, though their marriage has not been registered as required by Regulation 9 of 1822: and that the want of registration does not render such marriage generally

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invalid, but only makes it ineffectual for the purpose mentioned in the 3rd clause of that regulation.

The motion in arrest of judgment is therefore sustained by the court, and it is ordered, on the motion of the advocate (*Wilmot*) for the prisoner, that the fiscal of the southern province do discharge the said Dingy Appu from his custody.

Oct. 11.

D. C., Badulla, No. 58. } *Rangee* v. *Bahe.*

Per Curiam:—In this case the applicant represents that she is the only child by the first marriage of the deceased, and prays that letters of administration be granted to the second wife of deceased, and if she refuse to take out the same that they be granted to her, the applicant.

The widow of the deceased denies that the applicant is daughter of deceased and the court orders letters to be granted to the widow and adds "issue being joined on the point of the applicant being the daughter of the deceased, parties to proceed thereon."

A motion is then made that the case be set down for trial; and the cause coming on before a different judge who held that administration having already been granted to the widow the point as to the applicant's parentage could not be tried in these proceedings, an appeal was taken.

This court agrees with the judgment of the court below of the 5th July 1847 that letters of administration having been granted to the widow, the applicant must resort to a separate action to establish her relationship to the deceased. The order of the district court is therefore *affirmed.*

D. C., Jaffna, No. 2,672. } *Toussaint* v. *Vander Gucht.*

Per Curiam:—This action is against the defendant as the administratrix of her late husband's estate for goods sold to him during his life. The defendant has demurred to the action on the ground that it is prescribed by the Ordinance No. 8 of 1834.

It appears that the debt became due on the 22nd July 1844 and that a part payment was made by defendant's late husband on

the 29th August 1845, more than twelve months after the cause of action had accrued. The deceased husband died on the 17th January 1846, a demand was made by the plaintiff on the 4th June 1846 which letter of demand was acknowledged by the defendant on the 22nd September 1846; and the action was instituted on the 26th June 1847.

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The point for the consideration of the court is, whether the payment having been made more than one year after the debt became due, the action can be maintained? The 6th clause of the Ordinance No. 8 of 1834 enacts "that no action for goods sold and delivered shall be maintainable unless the same be brought within one year after the debt shall have become due except (as provided by the 7th clause) the creditor can prove any written promise, acknowledgment, or admission made, or act done by the alleged debtor within the term thereby prescribed for bringing the action and from which the court shall be convinced that the debt has not been satisfied."

These clauses are express in their terms and leave no doubt as to the intention of the legislature that no action is maintainable except in accordance with its provisions so clearly expressed. In this case the action was not commenced till nearly three years after the debt became due, and there is no admission of the debt either express or implied, within the term prescribed to bring it within the operation of the 7th clause. The plea of the defendant must therefore be allowed.

D. C., Galle, No. 134. } *Don Janis* v. *Jando* and others.

Per Curiam:—The order of the district court is affirmed. This is an application on the 28th February 1846 for partition of a garden under the Ordinance No. 21 of 1844, the applicant stating that he was entitled to half, and that other joint owners named therein were entitled to the other half in the proportions stated in the application.

The commission required by the Ordinance issued on the 9th December. On the 14th December four owners—who are stated in the original application to be entitled to one-eighth only—appear and file an opposition wholly denying the applicant's claim and asserting exclusive title in themselves.

On the 15th December the commissioners report is filed which finds the parties entitled in the proportion alleged by the

applicant, viz., the applicant in one-half and the opponent in small shares amounting together to about one-eighth.

On the 6th May 1847 the court on hearing the opponents ordered the proceedings to lie over until the respective rights of the parties should be decided by some competent court.

On the 12th May a motion was made to rescind the last order and was disallowed; and on the 15th of that month an appeal was filed from the order of the 6th.

The point made in appeal is on the judgment in case No. 74, which is referred to on the appeal.

On the objection that the partition ought to be limited only to the share of the applicant, and not affect other joint-owners desirous to still hold in common, it is only necessary to refer to the preamble of the ordinance and the provisions of the 10th clause that the commissioners are required "to divide the property and to allot the owners the shares to be held by each severally," and the 13th section enacts that the expenses of such partition shall be recovered in the following manner "from each owner a share of the costs of partition proportioned to the share of such owner in the said property." And the 15th section allows of sale of the whole common estate "for the benefit of all the parties interested therein."

The court is of opinion that the 10th, 11th and 12th secs. of the Ordinance make no provision for the case of disputed ownership, nor contemplated such an event; and if such a case arises the parties must settle their rights by an action at law, and the proceedings under the order must stand over in the meantime.

D. C., Galle, No. 152. } *Buller* v. *Koelman* and others.

Per Curiam:—The order of the district court is affirmed. The Supreme Court is of opinion that the application in writing, and the proceedings thereunder contemplated by the Ordinance, are of a special and summary nature; unless therefore the information filed in this case can be viewed in that light, it must be quashed as an irregular mode of application not being consistent with the other provisions of the ordinance, and the opponents cannot under such circumstances be called on to plead to the same, nor the parties be required to proceed to trial thereon in the ordinary course of proceeding in civil actions.

In considering the various provisions of the Ordinance it must be observed that the first six clauses relate to wills: the

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7th, 8th, 9th and 10th clauses regulate the partition of estates amongst heirs by executors: the 10th and four following clauses relate to the partition of land held in common; and the 15th clause provides in particular cases for the sale thereof instead of partition. It has been argued that this latter clause for sale must be looked at by the court as distinct from the other clauses relating to partition; but the court considers that it is only incidental thereto, and should be read as connected therewith, the preamble thereof shewing in what cases this provision of sale is intended to be exercised, viz. where "a partition would be injurious or impossible." Although the ordinance appears from the similarity of language in some of its provisions for partition to have been drafted partly from the English Acts on the same subject, yet those acts, and the proceedings of the English Courts of Equity for effecting a partition are far more careful of the rights of all parties interested than the present Ordinance, for instance, the act of the 32 Hen. viii. chap. 32, sec. 2 provided that no partition or severance to be made thereunder should be prejudicial or hurtful to any persons, or their heirs or successors, who were not parties to such partition. The act of Wm. III. chap. 31, after declaring in what manner a writ of partition might be awarded contained a proviso, that if any party should within a year after judgment shew good and probable matter in bar of the partition, the court might set aside its judgment and admit him to appear and plead, when the cause should proceed according to the due course of law, as if no such judgment had been given, The partition at law moreover operated by the judgment of the court of law, and delivering up of possession in pursuance of it, which concluded all the parties to it, but a partition in equity proceeds upon conveyances to be executed by the parties, and requires therefore all owners to be parties to it, to render such partition effectual (1 *Mad.* 328); and since the writ of partition has been abolished by the Act 3 Wm. IV. chap. 27, sec. 36 the bill in equity is the only mode of effecting such a division in England.

The plaintiff must thereon state on the record his own and the defendant's title, and unless they appear to be admitted, or clear on the pleadings, the court first ascertains either by reference to the master, or directing an issue, the respective proportions and rights of the parties (which is never done by the commissioners) and when they are fully ascertained, a partition is directed, and the commissioners make the division in those ascertained proportions. (See *Agar* v. *Fairfax*, 17 Ves. 533.—*Calmady* v. *Calmady* 2 Ves. 570.—*Wilson* v. *Cook* note 1.

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Mad. Ch. 329.) In the first, SIR W. GRANT observed "it seems to me to have been soundly objected, that it is impossible in the present situation to issue a commission; as then it must be referred to the commissioners, first, to ascertain their interests, and the proportions in which they are entitled, and then to make the allotment. The former was never done by commissioners. The court is to ascertain the proportions and rights of the parties, and when that is done then the duty of the commissioner begins to make the division in those ascertained proportions," 17 Ves. 543.

In construing the clauses of the Ordinance for partition and sale, the proceedings of a Court of Equity on partition appear to form the safest guide from analogy, to the relative duties of the court and the commissioners where the Ordinance is silent thereon. And on the 15th clause, the following further rules of construction may be noticed.

First.—The application for sale must be made by one or more owners, and no one else is competent to do so, the court therefore is not authorized to make any order of sale, where the right of ownership is denied, until the title of the parties is first ascertained.

Second.—The application is of a summary nature, as on default of the other owner not appearing, and shewing valid objection on a day named in the summons, the court may order a sale.

Third.—Such a summary proceeding is obviously ill calculated to enable the court to justly define the respective rights and proportions of the parties to landed property, where they are in dispute: although it may be very convenient and well adapted for the simple enquiry as to whether a sale was desirable and ought to be ordered on account of a partition being injurious, or impossible in the particular case; the rights and proportions of parties being admitted or first ascertained.

Fourth.—The commissioner to be appointed under the order of sale, is not required or empowered by the Ordinance to ascertain the right or proportion of the parties, but on the contrary he is to pay the amount realized into court for the persons entitled to the same, and it is to be paid over to them under the order of the court in the proportions to which they are entitled.

Fifth.—In the absence of any express directions in the Ordinance, as to how the respective rights or proportions of the owner should be ascertained when they are disputed on these summary applications, the Supreme Court considers, that the proper course is for such contested claims to be tried in an incidental suit, and the proceedings on the application to be

stayed, in like manner as directed by the 18th Rule of sec. 1 on claims upon sequestration.

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The only two other points that it is necessary to notice are, 1st.—Whether the Crown can avail itself of the provisions of this Ordinance?

Although mentioned in the district court, this objection has not been relied on by the respondent's counsel in his arguments on the appeal, and it is clear that the Queen may avail herself of the provisions of an Act of Parliament or Ordinance, though she is not bound by such as do not particularly and expressly mention her. (*Chitty Prerogative* 382, 11 Cr. 68, 6.

2ndly.—It has been urged that the Supreme Court may make rules, (although not expressly empowered to do so under this Ordinance) for regulating the proceedings thereunder in conformity with the course taken by the Queen's Advocate in this case, but the judges are of opinion that they possess no such power.

The Queen v. *Sinne Lebbe* and another. Dec. 20.

Per Curiam:—The prisoner in this case was examined on affirmation by a justice of the peace touching a certain theft at a time when neither he nor any other person was under suspicion, but when the justice was merely taking information. At his trial for the robbery in question, his examination abovementioned was tendered in evidence on the part of the prosecution, and objected to by his counsel as being taken on his affirmation. The judge admitted the evidence but reserved the point. The jury found him guilty and the matter came on before the collective court. The prisoner's counsel contended that statements on oath are inadmissible as given under constraint, except where a party is a witness against another charged, but that in this case no person was charged, and cited *Rex* v. *Lewis*, Russ: p. 857. *Rex* v. *Davis*, Russ: 856. He further contended that under the Ordinance No. 15 of 1843 sect. 23, the prisoner was not at liberty to refuse answering questions even though having a tendency to criminate himself.

On behalf of the Crown it was argued that the examination even on oath of a person not in custody, and not under suspicion is always admissible, and cited *Starkie on Evidenee* vol. 1, 198.—1 Philips 404, *Rex* v. *Tutby*, 5 Car. and Payne and *Rex* v. *Hayward Highfield's* case—*Moody's Cr. Ca.* And that supposing the court should be against him, yet that the prisoner having made another statement which was put in and which referred to his former statement as being what he had to say,

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the objection was thereby cured and such former statement rendered unobjectionable.

Mr. Advocate Morgan in reply, after supporting his former arguments contended that as the statement taken on affirmation was not read a second time to the jury after it became unexceptionable, it must be regarded as not having been read at all.

This court in considering the admissibility of evidence are constrained by the Ordinance to follow with certain exceptions the law of England. On referring to all the cases of which they are aware, the judges have to come to the conclusion that at this day in English courts the examination in question is admissible. The cases down to this year are collected and commented on in *Taylor on Evidence*, section 649 et seq.

With regard to the Ordinance No. 15 of 1843, the court construes the words relied upon to signify that where an answer is demandable it must be given, and that they were never intended to form any exception to the general rules of evidence. And lastly that if the examination should have been found inadmissible by reason of the affirmation, yet having been read to the jury subject to an objection, as soon as that objection was removed it became valid evidence and required not to be read again. The prisoner will therefore be brought up for sentence.

[On the 29th December *Mr. Morgan*, counsel for the prisoners, moved for leave to appeal to Her Majesty in Council, under the provisions of the 52nd clause of the Charter, against the determination of the judges collectively, and prayed that until such leave be granted or refused by Her Majesty, the sentence to be pronounced by the court upon the prisoners may be postponed.

The judges unanimously declared that the motion could not be sustained as the objections taken on behalf of the prisoners had been fully argued in court and solemnly determined.

The prisoners were accordingly sentenced. Vide *Collective Minutes*, 29th December, 1848.]

Dec. 20. D. C., Galle, No. 75. *Silva* v. *Silva* and others.

Bastian de Silva and another—Claimants.

Per Curiam:—It is ordered with the consent of the advocates of the respective parties that the order of the 11th day of August 1846 be set aside, and that the sale of the land under

the order of the 15th April 1846 be affirmed, and the amount realised by such sale be paid into the district court on behalf of all persons interested therein. And it is further ordered that the said amount shall be paid over under the order of the district court to the applicant, and other parties entitled to the same in the proportions in which they may be respectively entitled thereto, after deduction of such sum as the district court shall allow in satisfaction of the expences incurred by the commissioners in and about the said sale and conveyance.

The 10th and 15th clauses of the Ordinance require the application to describe the names and residences of all parties interested therein "so far as the same shall be known to such owner, or owners;" the simple omission therefore of any owner's name in the application will not in itself render invalid all subsequent proceedings thereunder, nor justify the district court in cancelling an order of sale thereon "quia improvide emanavit;" but if the court had proof before it of the applicant having acted *malâ fide* in such omission, and that he was not an owner, or that he had intentionally suppressed the name of some other owner who was well-known to him at the time, with the view of deceiving the court, this would be a good ground for the district court's cancelling any order of sale fraudulently obtained on such a false application, as the court can only act on the application of an owner, and also according to the civil law where fraud forms the ground work of the transaction "is ipso jure nullus est. Cumque id quod nullum est, nullum possit effectum producere" (Voet lib. IV. tit. 3, Cap. 3) the order of sale and all proceedings under it might in such case therefore be treated as *void* by operation of law and not merely as *voidable*, under the general maxim, that no one shall take adventage of his own fraud or wrong.

In the present case it is clear that the parties ought to have appealed from the order of the 11th August 1846, as in the absence of all proof of fraud the district court ought not to have proceeded to discharge the application, and thereby indirectly to cancel its previous order of sale of the 15th April 1846, and accordingly it is the interest of all parties concerned that an appeal should be now allowed from this order of the 11th August 1846, and that the said order should be hereby set aside, and the sale of the land be confirmed under the order of the 15th April 1846, as aforesaid.

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August 28.

C. R., Colombo, No. 6,988. } *Thomson* and others v. *Lambe Ratnals & Co.*

Per Curiam:—In this case twenty one plaintiffs, styled co-partners of the company called the Cargo Boat and Wharf Improvement Company, stand upon the record as plaintiffs, claiming from the defendants £4 13*s.* for landing and housing at their request certain goods from a certain ship in the roads.

The defendants objected, first, that there was a non-joinder of plaintiffs, but as this was waived by the defendant's counsel it is unnecessary to make further mention of it. Secondly, that four of the plaintiffs in the action are not co-partners of the company, and therefore are not properly on the record. Below these objections or pleas the court caused the following words to be entered "plea over-ruled."

With regard to the irregularity alleged to have been committed by the court in over-ruling the plea of mis-joinder, this court is of opinion that such plea should have been entertained. The court of requests did in fact by over-ruling this plea, prevent the defendants from shewing, whether successfully or not, that four of the plaintiffs had no joint interest with the others in the suit, and that they had no claim against the defendants in respect of the matter for which the action was brought. Now it is material to a defendant that persons be not joined as plaintiffs who do not pretend to have any claim against him, and whose names may have been placed on the record without their sanction, because if the defendant is successful in the suit and his costs be awarded to him, be may get into trouble and further litigation in endeavouring to recover them from parties who are in fact not liable to pay them; but besides, it carries inreasonableness on the face of it, that defendant even in a court of requests should not be allowed to shew that he is being sued and called upon for his defence by parties some of whom have no right to sue him or call for any defence. The court is of opinion that on this ground the judgment should be set aside.

C. R., Matura, No. 2,849. } *Altendorff* v. *Jansz.*

Per Curiam:—In this case the plaintiff complains that trees growing on defendants land injure plaintiff's premises by the falling of branches and fruits, and the court adjudged that these trees be cut down, and also adjudged damages to plaintiff with the costs of suit.

The question for the consideration of the collective court is whether the court of requests has not exceeded its jurisdiction in requiring the trees to be cut down? The Supreme Court is of opinion that it has. The Ordinance No. 10 of 1843 sect. 5 confines the jurisdiction to "all actions, plaints and suits for the payment and recovery of any debts, demands, damages or matter not exceeding £5 in value, except the matter in question shall relate to the title of any lands or tenements, or to anything whereby rights in future may be found." "Supreme Court Collective Minutes," 1849.

The plaintiff prayed and the court granted the prayer, that besides damages and nuisance should be abased; and this court is of opinion that under the words "for the payment and recovery of any debts, demands, damages or matter," the abatement of nuisance cannot be comprehended, that therefore the court of requests has exceeded its jurisdiction, and the judgment must be set aside, with the exception of the damages and costs.

D. C., Jaffna, No. 3,271. } *Ribery* v. *Sanmogum* and another. Augt. 28.

Per Curiam:—The court is of opinion that there is nothing in the agreement between the parties from which it can be inferred whose duty it was keep the vessel in repair and the court must therefore look to the law on the point.

A suggestion was made at the bar that it is the custom in the Northern parts of the Island for the hirer of a vessel to see to the repairs, but no such custom was attempted to be proved, and the court cannot take notice of a mere suggestion of counsel at the hearing in appeal.

The Roman-Dutch law is decisive of the question in favor of the respondent—*Grotius* in his "Introduction" Book III, chapter 19 section 12, has the following, "on the other hand the lessee has a right to the use of the article or to compensation for whatever appertains to him therein, consequently he may legally compel the lessor to keep the property leased in good order, so that it may be applied to its common purposes, this the lessor must do at his own expence, and should he neglect to do so the lessee may deduct the repairs from the amount of his rent, or he may abandon the use of what has been hired to him," and herewith agrees *Domat* Vol. I. Book I. tit. 4, sect. 3. Articles 1 and 7.—*Story on Bailments* sect. 388. The decree of the district court is therefore *affirmed*.

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D. C., Jaffna, No. 2,599. } *Toussaint* v. *Chettiar.*

Per Curiam:—Before deciding this case it is necessary that the Supreme Court be fully informed in respect of the custom relative to schedules of orders on transfers of landed property, The information required is *first*—whether by the custom a purchaser is bound to take conveyance of lands sold to him, to which there is no other objection, except that it is not accompanied by the Udeyar's schedule?

Second.—Is it the custom of notaries to pass transfers of lands without the production of such schedule?

Third.—Has it been the invariable custom for the fiscal from time immemorial not to sell lands taken in execution without the production of a schedule?

Fourth.—Has it been the invariable custom of the fiscal from time immemorial not to seize lands in execution without the production of a schedule, and if not from time immemorial in the two last mentioned cases when did such custom commence?

Fifth.—To what local limits is the custom of requiring schedules confined?

As the regulations for the guiding of the fiscal make no saving of the custom in question, and are therefore in the creditor's favor on the point under consideration, the court can only apply to the fiscal for proof of the custom, and the registrar is directed to make such application.

In re *Mary Elizabeth Atkinson*, late wife of *Joseph Sansoni.*

D. C., Colombo, No. 216. } *Vandersmagt* v. *Sansoni.*

Per Curiam:—In this testamentary suit letters of administration of the goods of the deceased were granted to her surviving spouse. Before the administrator's accounts are passed, what is called an application is made to the court by the son-in-law of the administrator on behalf of his wife, the daughter of the administrator and deceased, setting forth that at the decease of the intestate the said administrator did not perform his duty as surviving spouse by making division of the property, but kept possession of the whole for the space of sixteen years, and has now only rendered a statement of the intestate's property at the time of her death, and praying that the administrator may

be ordered to make two inventories, one of the property (meaning thereby the whole property at the time of the intestator's death) and another of the whole property as now held by the surviving spouse, thereby to enable the intestate children to make their choice and to enable the court to decide the shares to which the said children are respectively entitled.

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To this application the administrator puts in an answer, and the plaintiff replies thereto, and the case having been set down for argument judgment is given by which the court found in substance that a surviving spouse is only bound to render an inventory of the estate as it exists at the time of the death of the predeceasing spouse.

The court is of opinion that in a testamentary suit, it is not competent for a party having some interest therein to fasten upon another party interested therein, or connected therewith, and by a proceeding analagous to a suit but not a suit, to call upon such party to perform an act with which the last mentioned party has nothing to do in the capacity in which he appears in the testamentary suit, and that consequently a judgment given in such irregular proceeding is also irregular, and as irregular must be set aside. Each party must pay his own costs.

C. R., Galle, No. 2,194. — *Sammin* v. *Meera Cany.*

Per Curiam:—The plaintiff bought, as appears from the statements in this and the connected case No. 3,136, certain goods from the defendant, and being unable to pay for them deposited with the defendant certain jewels and gold as a security for the due payment. The plaintiff paid for the goods, as appears from the connected case, but the defendant failing to return the jewels and gold which had been deposited with him, the plaintiff brought the present suit to recover them.

It appeared from the examination of the plaintiff that the deposit was not made in conformity with the Ordinance No. 17 of 1844, section 25. The commissioner of court of requests non-suited the plaintiff and did not hear any evidence.

The point reserved for the collective division is whether the clause of the Ordinance in question applies to the present case, if jewels deposited as security for the due payment of goods purchased; or whether the term "to pawn" is not to be construed according to its common acceptation as a delivery of goods or chattels to another as a security for money borrowed.

"Supreme Court Collective Minutes," 1849.

The following authorities are referred to:

Sir Wm. Jones 117 and see p. 36.—"A bailment of goods of a debtor to his creditor to be kept till the debt is discharged. *Pignora acceptum* where a thing is bailed by a debtor to his creditor in pledge, or as a security for the debt."

Lord Holt.—"When goods or chattels are delivered to another as a pawn, to be security for money borrowed of him by the bailor, and this is called in Latin *vadium* and in English a pawn or pledge.

Pothier—defines a pawn or pledge to be "a contract by which a debtor gives to his creditor a thing to detain as a security for his debt, which the creditor is bound to return when the debt is paid."

Domat.—Pawn is "an appropriation of the thing given, for the security of an engagement."

A pledge or mortgage for payment of money lent.

Story see p. 286.—"The foregoing definitions "says Story" are in terms limited to cases, where a thing is given as a mere security for a debt; but a pawn may well be given as a security for any other engagement. In the common law it may be defined to be a bailment of personal property as a security for some debt or engagement."

Johnson's Dict.—Pawn. Something given to pledge as a security for money borrowed, or promise made.

To pawn. To pledge, to give in pledge. It is now seldom used but of pledges given for money.

Hallifax 80.—Pignus is the delivery of a thing to a creditor as a security for money lent on condition of returning it to the owner after payment of the debt.

In England a moveable chattel delivered as a security for money lent is called a pawn.

Code Napoleon p. 560.—Pledging is a contract by which a debtor places a thing in the hands of the creditor as security for his debt.

Pledging of a moveable is called pawning. Pledging of an immoveable is called hypothec.

Reference was also made to 2 *Raymond* p. 913.—*Viner* vol. 16 p. 263.—*Bell's Institute* p. 57 and *Story on Bailments* section 286 and 300. The court is of opinion that the ordinary and familiar signification and import of the word "pawn" at the present day is a deposit for money lent, and does not comprehend every deposit in security. "Words of a statute" says *Dwarris* p. 573 "are to be taken in their ordinary and familiar signification" and import, and regard is to be had to their general and popular use, for *jus et norma loquendi* is

governed by usage, and the meaning of words spoken or written ought to be allowed as it has constantly been taken *loquendum est ut vulgus.*" "Supreme Court Collective Minutes," 1849.

The judgment is therefore set aside, as the evidence should have been heard.

D. C., Galle, No. 14,332. } *Dias* v. *Dias* and others.

Per Curiam:—On reading the endorsement of the registrar on the petition of appeal, we consider that the appeal cannot be entertained, the petition of appeal not having been lodged in the registry within twenty days after the date of the judgment exclusive of the day on which the judgment was given, and of the day of filing the petition. The words of the Ordinance seem of themselves sufficiently clear to put it beyond a question that the judgment should be dated as of the day on which it was given or pronounced, and the time run from that day; and on reference to the English practice, it is found to be the same, and the conclusion is, that the Ordinance meant what it has expressed, and that it was intended to follow the English construction.—3 *Brown's C. C.*, *Smith* v. *Clay*.—*Taylor on Evidence* 1,093. "Supreme Court Collective Minutes," 1850. Dec. 21.

D. C., Caltura, No. 13,252. } *Natchia* & another v. *Casy Lebbe* & another. Dec. 24.

Per Curiam:—In this case the plaintiff claims ¼ planting share in a garden, against her brothers the defendants, and stating that in a prior suit against them for it No. 12,983, the court had only adjudged one-seventh to her.

The defendants by answer plead *res judicata*.

The district judge (Mr. Smedley) thinking the decree No. 12,983 had been erroneous, and that plaintiff from poverty had not adduced evidence or appealed, wrote a letter to the judges for their advice as to the course to be pursued. The judges declined to give any opinion, and afterwards the district judge on the cause being heard, stated that the matter really was *res judicata*, but, considering the hardship, he over-ruled the objection, and ordered the defendants to file an amended answer to the merits.

On appeal this order was *affirmed* by Mr. Justice Stark on circuit.

On the case coming to hearing again on the amended

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pleadings on the merits, the then acting district judge (Mr. Clarke) decides it as clearly *res judicata*, and non-suits plaintiffs.

This decision was appealed from, and the Supreme Court is of opinion that it must be set aside (and it is hereby set aside), and the case must be proceeded with. For although the district court may be quite correct in holding the case as *res judicata*, yet it was *ultra vires* of the district court to non-suit the plaintiff, inasmuch as a decision of that court, affirmed on appeal, and not brought before the judges sitting collectively for error, had decided—whether right or wrong this court cannot now consider—that although the case was *res judicata*, yet there were circumstances which overcame that objection and gave the plaintiff a right to perfer a new claim on the same merits. Each party to bear their own costs.

Dec. 24.

D. C., Galle, No. 13,927. } *Noncho Hamy* v. *Aberan* and others.

Per Curiam:—This case was reserved on a point of practice under the rules as stated below.

On the 16th June the plaintiffs set down the cause for hearing on the 4th September.

On the 18th August the plaintiffs applied, by motion in writing filed, to withdraw the case from the trial roll, which the court rejected as no cause was shewn.

On the 4th September the cause was called on for hearing, the plaintiffs renewed or made a fresh motion to draw the case from the trial roll, which was also rejected, as no cause was shewn under the rule of 6th December 1845, and the plaintiffs were thereon non-suited. (See rule 17th June 1844, sec. 7.)

On appeal it is urged that the court could not non-suit the plaintiffs, but only strike the case off the trial roll, as the plaintiffs had not given notice of trial pursuant to the 9th sec. of the rules 5th July 1852, and they cite a judgment of the Chief Justice which is in the connected case.

On reference to that case, it appears that the defendant was absent, whereas in this case he was present. The objection that notice of trial was not given could only be made by defendant for whose benefit it was provided. The plaintiffs could not urge the want of it as a reason for withdrawing the case, and the district court properly rejected the application. The decree of the district court is therefore *affirmed*.

Where the party who has set down the cause neglects to give notice of trial to the other party who is not present on the day of trial, the cause will be struck off, and the party neglecting to give notice will pay the costs of the day; and it will be the fault of the other party if further delay take place as he may set down the cause himself. "Supreme Court Collective Minutes," 1850.

D. C., Galle, No. 13,525. } *Assen Saibo* v. *Ludovici*, official administrator.

"Supreme Court Collective Minutes," 1851. Jany. 3.

Per Curiam:—The Supreme Court, following the decision in the collective case of Galle No. 8,262, 24th July 1845, holds that the debt is not prescribed; and further that the objection taken by the appellant's counsel at the hearing before the collective court—that half the debt only is recoverable from the principal debtor's estate, inasmuch as the plaintiff was only bound as surety for half the debt, the *beneficium divisionis* not being renounced—is untenable. The law appearing to be, that where a surety though not bound to pay the whole debt, does so, he is entitled to recover the whole from the principal debtor. *Grotius Intd.* by *Herbert* p. 297 and the authorities cited there. *Domat*, vol. I. p. 402.

D. C., Chilaw & Putlam, No. 12,616. } *Seneweratne* v. *Don Bastian*.

Per Curiam:—The plaintiff claims in this case on a mortgage bond for £8 15*s*., and under it the mortgagee was to possess in lieu of interest the profits of the garden mortgaged.

The defence failed, and the district court has adjudged the defendants to pay the £8 15*s*. together with a sum of £24 sterling for profits of the garden as claimed by the plaintiff.

The Supreme Court is of opinion that no arrears of interest which exceed the principal can be recovered, whether such arrears arise from profits of land not enjoyed, or from money stipulated to be paid as interest and allowed to fall into arrear. In either case the fraud is the same upon the rule of law restricting the profits of the principal falling in arrear to the amount of principal; and there is nothing in the authority cited by the counsel for the respondent (3 *Burge* 197) to the contrary.

The decision so far as regards the sum of £25 sterling,

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awarded to plaintiff as profits, is therefore set aside, and the sum of £8 14*s.* 6*d.* being equal to the amount of the principal is given in lieu thereof.

Jan. 3.

D. C., Chilaw, No. 11,148. } *Douwe* v. *Jayewardene.*

Per Curiam:—Both by the Roman-Dutch law and by the English law, a proctor cannot abandon the conduct of a client's suit under the circumstances in which the respondent has abandoned them as disclosed by this case. The respondent gives no reason to the client for abandoning the cases, but contents himself with pleading that he gave a general notice that he was about to leave the district, and calling on persons who had claims against him to prefer them for settlement.

It is also the practice of the courts of law in England, that a party cannot change his attorney without leave of the court. *Twort* v. *Dayrell* 13 Ves. 195. And the case of *Menties* v. *Rodrigues*, 1 Price 92, shows that an attorney having entered appearance for a client, may not strike it out without leave of the court. *Voet* vol. 1, Lib. 3, Tit. 3, C. 22.—*Gail* Lib. 1, sec. 1 and 2, Obs. 45. And the cases cited in *Har. Digest* tit. "attorney"—*Arch. Prac.* p. 71. The late case of *Nichols* v. *Wilson*, Law-Journal Reports Exch. 1843, Jan. 7. 26. establishes the principle that had been already recognized in *Harris* v. *Osborne*, that an attorney retained to prosecute or defend a cause enters into special contract to carry it on to its termination.

Decree set aside and defendant appellant absolved from the instance with costs.

D. C., Tangalle, No. 1,174. } *Tillekeratne* v. *Tennekoon* and others.

Per Curiam :—The decree of the district court is *affirmed.* It was urged for the appellant,

Firstly.—That the deed, the matter of dispute in this case, is not valid inasmuch as no acceptance by the donee has been proved. *Vanderlinden* 215. *Grotius Int.* 285. *Sande B. K.* 5, Tit. 1, Def. 1. *Voet* 39. 5. 11; and that such acceptance being part of the gift must appear on the deed, 2 *Burge* p. 143, and by Ordinance of 1834 must be in writing.

Secondly.—If the deed be good, yet that the donor had no power to make the same, being a married woman, inasmuch as cohabitation followed upon registration, and the registration being prior to the marriage in church (although cohabitation

might not have been proved until after the Church ceremony,) the registration followed by cohabitation, however remote afterwards is to be taken as the date of the marriage. "Supreme Court Collective" Minutes, 1851.

As to the *first* point, the court is of opinion that any proof of the will to accept on the part of the donee, although no form be used, will be sufficient to sustain the grant. Here the donee has accepted the deed of gift—which was all he could accept—as proved by his producing it. This the court considers sufficient proof of acceptance. Were it not so to be considered, nine-tenths of gifts made by country notaries would be inoperative. There is no necessity that the acceptance must appear on the face of the deed. Neither does the Ordinance of 1834 in any way apply to the case.

As to the *second* point, the court agrees with the district court on the facts, being of opinion that no credible evidence was adduced to prove that cohabitation took place before the ceremony in Church, whilst the same is strongly negatived by the ante-nuptial contract to which the appellant is a party; and the court is of opinion that registration does not make a marriage between natives *per se* giving effect to it from the date of the registry, and it may admit of doubt whether in any case the marriage dates from the registration, by virtue of the registration. Thus if a marriage ceremony be performed either in Church or elsewhere, it should seem that the marriage dates from the day of the ceremony, and the registration is requisite evidence to make it valid.

But the court is clearly of opinion that if between the registration and a subsequent ceremony there be no cohabitation, the ceremony is a marriage properly evidenced and not to be rendered invalid by subsequent cohabitation to the marriage.

D. C., Kandy, No. 19,931. } *Ukkoo Hamy* v. *Appu.* Jan. 4.

Per Curiam:—The plaintiff is decreed to be entitled to recover the whole of the land in dispute with costs.

In this case the original proprietor of the lands in dispute died intestate, leaving a widow and two daughters minors. Of whom the eldest married in beena, and was the mother of the plaintiff; but the youngest was married out in deega by her mother, and subsequently sold half of the lands to the defendant by a deed, under which he claims such moiety.

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The Supreme Court is of opinion that the mother was entitled to give her said daughter away in deega after the death of her father, and that upon being so married out in deega this daughter was debarred from inheriting any portion of her father's lands, the whole of which devolved on her sister married in beena.—*Armour* p.p. 24, 114, 117, 118.

May 28.

The Queen v. *Ama Lebbe.*

Per Curiam:—The judge who heard the case reported to the judges that before the judge summed up, it was objected by the prisoner's counsel that the crime could not amount to murder, inasmuch as the persons endeavouring to apprehend the prisoner were not acting under legal authority; that the 7th clause of the Ordinance No. 15 of 1843 gave no authority, as it did not appear that Mr. Morris who verbally appointed Coopey Tamby as constable was fiscal, nor did it clearly appear that there was any headman or other officer present authorized to act; that neither did the 10th clause give authority, because by that clause private persons are only empowered to apprehend criminals where the crime has been recently committed which in this instance was not the case.

The judge charged the jury if they believed the evidence as given to find a verdict of guilty of murder and that he would reserve the point abovementioned.

The Supreme Court sitting collectively, having read the evidence, heard counsel for the Crown and weighed the whole case, are of opinion that the objections taken by the counsel for the prisoner are inapplicable to the case and must be overruled, and that the verdict of the jury is correct, inasmuch as by the 11th clause of the said Ordinance under the circumstances as detailed in evidence Coopey Tamby and his companions acting as private persons had authority to arrest the prisoner.

The Queen v. *Waitee* and another.

Per Curiam:—The question reserved here is whether the property in a dwelling house alleged to be broken is sufficiently laid in certain persons named respectively Appoohamy, Dingery Menika and Kiri Manika and the property stolen be well laid as of the said Appoomany, he as also

the others having a "gey" name. Appoohamy says that he is always spoken to as Appoohamy and never by his "gey" name, it is the name by which his neighbours call him. "Supreme Court Collective Minutes," 1847.

This court will not narrow the English practice on the point, which is to sustain an indictment laying property in a person by the name by which he is generally known. The conviction therefore stands good.

D. C., Tangalle, No. 1,154. } *Somangelle Terunanse* v. *Sonnothe Terunanse.* May 28.

Ranasing Appu and others—Intervenient.

Per Curiam:—The decree of the district court of Tangalle of the 3rd September 1849 is affirmed with costs. The district court has twice given judgment against the plaintiff on the evidence adduced by the parties and the collective court sees no sufficient cause to dissent from such decree.

The evidence of the 5th, 6th, and 7th witnesses called for the plaintiff on the further hearing appears to be entitled to much weight; and as the 7th witness is the high priest of the Amerapoora sect and the parties belong respectively to Molkerigalle and Wihelle, which are both of the Siam sect, his evidence may be referred to as disinterested and independent in the matter of dispute, and he deposes "I belong to the Amerapoora sect, and am chief priest. There are two original sects in the district (Tangalle) viz; Amerapoora and Siam societies, this latter is divided into two sects viz, Wihelle and Molkerigalle, the priests of these sects have separate temples. A priest of the Wihelle sect may by consent occupy a temple belonging to the Molkerigalle sect, but the former cannot be ousted, unless that he has been excommunicated for some crime or other, but he cannot be ousted for exercising any rights in it." He adds further "although the temple might originally have belonged to the priest of one sect different from the sect of the resident priest, the latter cannot be ousted, and the produce of the temple property cannot be withheld from him if the temple and property be Sangeeka," which the temple in question is proved to be; and the witness on these points is fully corroborated by the 5th and 6th witnesses who are priests of the Siam sect.

Admitting even therefore that Goddapittia Terunanse and his pupils Caderoepokene and the plaintiff had a right to the temple under the deeds 1,800 and 1,818, still the defendant was clearly with their consent inducted to the temple, and has for many years been the resident priest thereof and officiated

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therein, and he is moreover proved by the plaintiff's 1st witness (on the first hearing) and others to have repaired the temple and kept the temple property in order and enjoyed the produce. Whilst the proof of the plaintiff having during the same period exercised any act as owner of the temple property is not only very conflicting, but as appears from the testimony of his 7th witness such acts on the plaintiff's part would be contrary to the buddhist tenets, as the witness says "the produce of one temple which is Sangeeka cannot be removed from that temple and consumed by a priest of another temple, it must be left to the resident priest for his support."

June 11.

D. C., Kornegalle, No. 12,121. } *Kuda* and others v. *Dingo.*

Per Curiam:—The decree of the district court is reversed with costs, but with liberty to the defendant to file an answer within twenty days after this order having been notified to him, upon his payment of the costs of the demurrer.

The consideration or condition of the deed of gift is "to render all and every necessary assistance till my death, and after my death, to cause my remains to be buried according to the custom of the country." Now the custom on such gifts is for the donee to send one or more servants to wait upon the donor, and to supply provisions and medicines, and procure due burial according to his ability, the condition of the party and the value of the land; (see *Marsh. Digest.* p. 321 par. 46) and such services not being required to be rendered personally by the donee himself; his heirs, although not named in the deed, take by law on his death an interest in the condition and may perform it.

Whether the services have been continued to be duly rendered to and accepted by the donor during her life, or whether she ever expressly revoked the deed of gift and resumed possession, are questions for evidence upon such points being raised in defence by the answer.

D. C., Ratnapoora, No. 5,636. } *Basnaike Nilleme* v. *Mudianse* & another.

Per Curiam:—The decree of the district court is affirmed with costs; but without prejudice to the plaintiff's right to institute a fresh action against the defendants as mere tenants at will, if the plaintiff be advised that he can prove the lands to be held by the defendants under such inferior tenure.

It does not appear on the plaintiff's pleading in this action that the defendants hold the lands as tenants at will, and not as tenants in paraveni subject to the performance of the services; in which latter case the lands would be alienable by the tenants, although they would continue liable thereon to the same services. (See *Marsh. Dig.* 297,300; and *Armour* 266,) And the plaintiff's counsel admits the claim to be general, and that he is not prepared to aver that the defendants are not tenants in paraveni.

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D. C., Kandy, No. 20,898. } *Ukkua* v. *Tikiry*. June 11.

Per Curiam:—The decree of the district court should be reversed, as we consider that the decision of the collective court in the Matelle case No. 3,574 ought to be followed, and that the point was fully considered and decided in it, and also in another case from the late district court of Kandy, (north) No. 1,333 heard at the same general session.

The *Digest* of Sir Charles Marshall, Tit. "Kandy" par. 68, has been referred to, as favoring rather the rule of division *per capita* than *per stirpes*. The portion of the *Digest* was not published until after the above collective decision; and the judges would certainly incline to such a rule of division as being most consonant to natural justice, if they could view it as an open question, and consider the result of the various conflicting decisions fully justified such opinion, which they cannot do.

The rule that a deega daughter inherits exclusively when she is the only issue, and a moiety, if she is sole child of the first marriage, although there may be several children of a second marriage), may be referred to as strongly in favour of the rule of division *per stirpes*.

There seems to have been a difference on the point between the Udderatte and Saffragam customs, and much difference in practice has occurred, which renders some legislative provision desirable. Under all the circumstances, the parties will bear their own costs in appeal.

D. C., Kandy, No. 22,249. } *Lakeman* v. *Bain*. June 18.

Per Curiam:—The Roman law held a malicious intent essential to constitute a verbal injury. *Cod.* lib. 9, tit. 35 *de injuriis* L. 5, and the Dutch law seem to have adopted this principle generally, *Voet* lib. 47, tit. 10, c. 20.

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It does not appear to the court looking at the evidence in this case that the defendant was actuated by malice. By the English law the matter complained of would be regarded as a confidential communication and as such privileged. The law as laid down by PARKE B. in *Cockaigue* v. *Hodgkesson*, 5 Car. and P. 543, seems also to be consistent with natural equity, "That where a writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has by his situation to protect the interest of that person : that which he writes under such circumstances is a privileged communication, and no action will lie for what is thus written, unless the writer be actuated by malice." In such a case therefore as the present, malice in the defendant is essential to maintain the action, both by the Roman-Dutch law and the English, and the court is of opinion in natural equity also. And it therefore becomes unnecessary to consider which of these laws is applicable to the Kandyan provinces, more especially as the judges have submitted for the consideration of the Government a proposition to declare what shall in future be the law in these provinces.

June 18.

D. C., Galle, No. 14.502. } *Don Cornelis* v. *Manuel Perera.*

Per Curiam:—The decree of the district court is reversed, and case remanded back to the court below to hear the evidence to prove the want of consideration alleged in the answer, and the plaintiff's evidence in reply, and to give judgment *de novo*. The costs are to abide the result.

The bond in question cannot properly be viewed in the light of an English deed or specialty, because the seal of the grantor is not essential in this colony to the validity of such a bond, and if added, may be regarded as mere surplusage. The distinction between specialties and simple contract are unknown here, and the bond in question can have no greater force than the latter, in which by the English law of evidence the want or failure of consideration may be proved on the defence. The case of *Hendrick* v. *Abbott*, 2 Scott N. R. 183— 1 Man. and G. 791, Har. Dig. 7,061, may be specially referred to, where in an action on a promissory note in which the consideration was expressed to be for commission due to the plaintiff for business transacted for the defendant, it was pleaded that the real consideration for the note was services to be thereafter rendered by the plaintiff, and which had never been

performed; and the court held that "evidence in support of this plea was admissible, and ought to have been received by the judge at the trial." "Supreme Court Collective Minutes." 1851.

So moreover parol evidence is admissible in equity to shew under what circumstances a bond was executed: "the instrument is not to be contradicted, but parol evidence may be given why it was executed, and what was the intention of the parties in executing it"—1 Ball and B. 14; and in *Nichol* v. *Vaughan,* 1 Clark and Fin. 49—Har. Dig. 1,390. Where a bond was on the face of it a simple money bond, but was given as an indemnity, the court held that it must be taken to be a simple money bond, unless impeached by evidence which showed that it was "partly for indemnity, and that the burden of proving it to be an indemnity bond lay upon the party impeaching the bond."

By the Roman-Dutch law also, if the debtor admitted the bond and denied that the money had been counted and paid, the creditor must prove such payment, if within two years, unless the debtor had released him from doing so, by having renounced in the bond the '*beneficium non numeratæ, pecuniæ*' which is inserted in this bond—but the debtor would be still entitled thereon to adduce proof, that the money was really not counted and paid to him—See *Van L.* 376 and *Marsh. Dig.* 451.

D. C, Colombo, No. 4,821. } *Ameresekere* v. *Jayewardene.* Dec. 19.

Per Curiam:—This action is brought to compel the defendant specifically to perform an agreement entered into by him with the plaintiffs for the purchase of land.

The libel states that the amount of purchase money was to be £450, and that the defendant executed before a notary and two witnesses a document binding in law as against him, the defendant.

Defendant denies generally, and in particular, that no contract was made binding in law as against him.

A treaty of letters respecting the purchase was carried on between the parties, but there is no letter from the defendant closing the plaintiffs' final offer.

The district court found that the document signed before the notary and witnesses, is what is to be considered as an agreement between the parties, and bound the defendant. The document founded on purports to be a receipt and not an agree-

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ment *de presenti*, but refers to an agreement on the following terms :—

" Don Cornalis Ameresekere (the plaintiff) having agreed with me by letters bearing date the 9th inst., with respect to the garden Pahale Ambegahawatte otherwise called Bandarewatte, I have received the sum herein mentioned (£450)."

It was contended for the plaintiffs that this receipt being signed and witnessed as by law required to pass real property did—taken in conjunction with the agreement to which it refers—bind the defendant.

Without deciding the general question of the validity or invalidity of agreements not notarial referred to by a notarial deed but not annexed to it by tape and seal or otherwise, the court is decidedly of opinion that in this case the reference is much too vague, and that there is also no concluded agreement to which to refer; nor can it be any where found, but only inferred, what was the amount of purchase money which the defendant had to receive.

The court is therefore of opinion that the decree of the district court of Colombo must be set aside, and it is ordered that the defendant be absolved from the instance, but under all the circumstances of the case, the parties are decreed to bear their own costs.

Dec. 19. D. C., Kandy, No. 23,519. } *Saiboo Tamby* v. *Ahemet.*

Per Curiam :—In this case the decree of the court below should be was set aside and the case remanded back to re-hear the case with Moorish assessors, and to give judgment *de novo* according to the laws of inheritance and customs prevailing amongst the Moors in the colony.

The Kandyan laws are silent on the point, and the cases cited since the accession are chiefly in favour of the Moors enjoying the privilege of being governed by their own laws and customs of inheritance and marriage, which are founded on their religion. The costs are to abide the result.

Dec. 31. D. C., Kandy, No. 24,146. } *Grey & Co.* of Bombay v. *Arabin* of Nice in Piedmont.

Per Curiam :—The first question presented in this case is,—was Locke a person "lawfully authorized" by the defendant to sign the agreement for him.

The court is of opinion that he was so. The Ordinance No. 7 of 1840 does not require the agent to be authorized in writing, but uses the words "lawfully authorized" alone, leaving it for parties to discover, courts to decide, what shall be "lawful authorization."

The notarial agreement in this case, as also the prior memorandum of agreement therein referred to, were both made at Colombo and must be governed by the law in force between the contracting parties there, and this law is the Roman-Dutch law, and which law, so far as we can discover, no where requires such an authority as the one under consideration, to be in writing. It cannot with certainty be said that Mr. Locke was the defendant's *procurator cum libera administratione*; neither is it material for the plaintiffs to have proved him so to have been. Mr. Thompson swears that he was defendant's procurator or agent for this particular business. He says "I know Mr. Locke to be the agent of Captain Arabin for this particular purpose," and it is satisfactorily proved that the defendant not only never disputed, but clearly ratified, the acts of his agent by paying part of the purchase money &c. If we regard the English law on this point, we find the words "lawfully authorized" used in the Statute of Frauds are not held to import an authorization in writing. The court therefore is clearly of opinion that Mr. Locke was an agent lawfully authorized to sign for the defendant the agreement in question.

We now come to the validity of the agreements. On the assumption that Mr. Locke was the lawful agent, no objection has been raised to the agreement of 1847 so far as regards the 831 acres, the excess of the land agreed thereby to be sold for £4 10*s.* per acre; and the only questions which remain are,—Is the agreement of 1847 effectual to charge the ownership of the 583 acres therein mentioned, taken without reference to the memorandum of agreement of 1843? Or if not, is it lawful to refer to the memorandum of 1843 and thus raise up an agreement binding in law from the memorandum and the agreement taken conjointly?

The court is very averse from making reference to any document, we mean any not virtually incorporated with the notarial deed by seal and tape of the notary, for although the allowing of such reference by the English law in England may work equitably and beneficially in that country, we think it would work most prejudicially in this island and open a wide door to fraud and forgery. For it must be remembered that laws must be made and expounded here with reference to the mass of the people, and not to the handful of Europeans scatter-

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ed thinly amongst them. It need not be pointed out to those acquainted with the deceitful habits of the natives, the advantage which would be taken of changing the whole tenor of deeds to which reference might be made, and on which there would be no check by any copy to be found in the notary's protocol or the district court.

But in this case the court thinks that there is no necessity to refer to the memorandum of agreement supposing that could be done. The court considers that in the notarial deed there is an acknowledgment made by both parties, duly signed and attested as by law required, that a purchase and sale of land had taken place between them and further that the terms of the contract sufficiently appear therein without further reference.

The decree of the district court of Kandy is therefore reversed with costs, and judgment must be entered for the plaintiffs for the amount of their claim.

Dec. 31.

P. C., Galle, No. 12,438. } *Batchy Hamy* v. *Casy Lebbe.*

Per Curiam :—The charge in this case was for unlawfully detaining the prosecutrix's son, and the point reserved is,—whether the complaint is within the jurisdiction of the police court? This is of opinion that it is so, an unlawful detaining of the person being in the nature and within the legal signification of a false imprisonment, to which police courts are clearly competent.

The order of the Supreme Court reserving the point is in the usual form, affirming the judgment subject to the reservation mentioned. There has been no judgment however in the case, nor indeed any evidence whatever of the charge, or of any lawful detaining of the prosecutrix's son. The sentence or order of the police court for the delivery of the child to the prosecutrix was therefore irregular, and must be set aside, not only because of the want of evidence, but also for this reason that police courts are courts of criminal jurisdiction, instituted for the hearing, determining and disposing of crimes and offences punishable by law and have no power to make such an order as has been passed in this case.

The order of the 25th June 1851 is therefore set aside for irregularity and of jurisdiction.

D. C., Trincomalie, No. 17,542. — In re *Teywane*, widow of *Super* deceased. *Coneper*, administrator. — "Supreme Court Collective Minutes," 1851.

Per Curiam :—In this case the point reserved was whether the district court had power to make an order "that an administrator was to be imprisoned, if he did not file a satisfactory account within a given time, in default to be committed to gaol." The administrator had filed his account but there were objections to it.

This court—although of opinion that the district court had no power to make such order—finds no assessors were present and therefore the order of the district court is set aside entirely as being irregularly made.

D. C., Jaffna, No. 2,599. — *Toussaint* v. *Veerapatran*. — "Supreme Court Collective Minutes," 1852. Jany. 3.

Carr and Stark, J. J. (*dissentiente* Oliphant, C. J.) :—In this case the fiscal returned a writ of execution issued by the plaintiffs against the defendant's property unexecuted, on the ground that the plaintiff had failed to bring a schedule from the Udear.

The plaintiffs thereon made a motion to compel the fiscal to execute the writ, no such schedule being required by the general rules respecting the duties of fiscals, but the district court refused the motion as the court did not see any reason for interfering with the practice adopted by the fiscal; and from this order the plaintiffs have appealed.

The collective court has called for information from the fiscal as to the existence of the custom of requiring schedules, and the continuance of the practice in the fiscal's office respecting it. And from the report of the fiscal, with the statements annexed thereto, it appears that schedules have been granted since 1806, and that from 1820 to the present time lands have neither been seized nor sold in execution without a schedule; and any definitive information respecting the practice in the fiscal's department prior to 1820 would, he adds, be difficult to obtain. The practice in the fiscal's office of requiring schedules therefore has existed for thirty years, and no origin being assigned thereto, it may be inferred to have been in existence at the earliest period of the custom: a duration or period very different from "the two or three years" only which the appel-

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lants, in their first opposition to the demand for a schedule, appear to have supposed it to exist.

Admitting that the schedule is required, the next question is as to the mode and time of obtaining it. The fiscal, in his first report of the 5th January 1849, has stated an alteration in the practice of his office in this respect since the Ordinance No. 1 of 1842, in order to make it accord with the provisions of that Ordinance; and he has urged strong reasons in support of such alteration, and that the party himself should procure the schedule, as he, and not the fiscal, should proceed against the Udear for refusal or neglect according to the provisions of the Ordinance.

The General Rules, not having expressly required the party to procure the schedule, have been relied upon in favour of the appellants; but their total silence on the subject does not exempt the party from acting in compliance with any existing custom, and it is not contended that a schedule and publication are not required on a sale or deed of transfer of the land, although the general rules are equally silent thereon. The party, moreover, is bound to point out the land to the fiscal, and a necessity of a schedule in so doing is party admitted by the plaintiffs having voluntarily produced the schedule, which they got in their mortgage for the fiscals use.

Under these circumstances, as the practice and usage in the fiscal's office appear to be in conformity with the custom as far as it can be ascertained, and also of the Ordinance No. 1 of 1842, this court will not interfere therewith.

Oliphant, C. J.—I am sorry that I cannot concur in the judgment in this case. I am strongly inclined to think that the second witness S. V. S. Ayer is correct, when he states that the practice of granting schedules commenced at the time that stamps for deeds were first introduced in 1806.

I can find no trace of schedules being granted by the Udear in the Thesavalamai, nor in the Regulation No. 18 of 1806. I find in that regulation that the Thombo Registers were to be given back to the School-masters—(who had them in the meantime I know not.)

In the Thesavalamai sect. 7, we read that since Blom's time, no sale of land whatever has taken place, until the intention of such as wish to sell the same has been published on three successive Sundays at the Church to which they belong, that all interested might have notice.

But there is no mention made either in the Thesavalamai or in the regulation, of any schedule to be granted by any person,

One should suppose that if a schedule were to be granted regarding the ownership of the land, that such would be done by the Schoolmaster as holder of the Thombo. But he is not required to do so.

It is observable the Thesavalamai evidently does not contemplate sales by process of law but such as were merely voluntary.

I know not whether the publication in practice at Jaffna is, according to the orders of Blom, by publication on three successive Sundays at Church, or according to the rules of court for the fiscal, or whether both modes are in use.

If the former mode be only used, I know not whether the Udear or any other person certifies that publication has been only made.

Why should the Udear have anything to do with the matter, if he be not the Thombo-holder, and even if he be, of what use is his schedule?—even in the case of voluntary sale it is surely not to be supposed that his dictum, as to who was proprietor of the land can confer the slightest title upon any one. Is the schedule of any use to any human being except the Udear? But supposing that some good reason should exist why land should not be transferred in any case, whether by the notary or by the fiscal without a schedule, what reason exists why the schedule should be produced to the fiscal at the time of the seizure?

The fiscal can get into no trouble by seizing land without schedule, the parties can make their opposition equally well, whether there be schedule or not; and one cannot see, until better informed, why a schedule, if really necessary for the safe transfer of property, should not be produced to the fiscal before he gives conveyance or at the earliest on the day of sale.

I am strongly of opinion that, unless some new light can be thrown on the subject, there is no ancient custom of the people of the country other than that mentioned in the Thesavalamai before Blom's order, and that the obtaining of schedules from Udears, if it did not arise in 1806 as before mentioned, comes in place most likely of a Dutch regulation, requiring the Schoolmaster to give schedule and was substituted by the English, and that the observation of it in the fiscal's office is simply a practice arising in that office perhaps about the year 1820, and cannot be called a custom.

The Ordinance No 1 of 1842 affects the question in no way, as it only regulates what is to be done when parties apply for a schedule.

Is it the custom when a European sells his cocoanut

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estate, which he has by grant from Government, that, if the purchaser insist upon it, the Udear must get his £5 for the schedule; or does the custom in favour of the Udear run only against the Tamils, or how otherwise?

In my opinion no custom is sufficiently proved, and if it were, there is no evidence to shew the use of such custom, and it appears to me to be bad. I think therefore that the judgment of the district court should be reversed.

Jany. 3.

D. C., Batticaloa, No. 10,936. } *Slema Lebbe* v. *Poker*.

Per Curiam :—This was an action brought to have certain land released from sequestration. It appears that the land in question was on 1st July 1844 sequestered under a writ at the instance of the defendant in the case No. 9,303, and that the same land was subsequently in December 1844 sequestered under a writ at the instance oft he plaintiff.

In 1845 the fiscal put up the property for sale under the plaintiff's writ, when three persons alleging themselves to be creditors of the owner of the land came forward and opposed the sale, which was in consequence stayed.

Directly after this in April 1845, a private transfer (D) was made of the land by the owner to the plaintiff, he paying £75 which was to be received in full satisfaction of his debt, which, exclusive of costs, amounted to £67 10*s*; and he further undertook to pay, in consideration of the transfer to himself, the sum of £45 15*s*. to the three persons who had opposed the sale: such being the amount of their claim, over and above the amount of his own claim.

In 1848 defendant ignorant of this private arrangement applied to the fiscal to have the land sold in satisfaction of his writ, when plaintiff opposed and set up his title, and the sale stayed. Hence the present action.

The land was specially mortgaged to the plaintiff, the defendant having only a simple debt-bond from the original owner, which was of prior date.

The defendant contends 1st that the land, while under sequestration under his writ could not be privately sold to the plaintiff, and that therefore the transfer to the plaintiff should be set aside; and 2ndly that admitting that plaintiff had a preferent claim, still the other three creditors have no preference even though they had just claims but of which there is no evidence.

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The plaintiff contends 1st that the defendant had lost his rights by delay; 2ndly that the plaintiff had no notice of the land being sequestered by the defendant; and 3rdly that no fraud is alleged or proved against him.

The assessors thought there was collusion between the plaintiff and the Wanniah. The district judge, on the other hand, thought there was no proof of fraud on the part of the plaintiff, and that the defendant had lost his right to annul the sale, by his own negligence, he having, it is said, taken no steps for the execution of his writ from July 1844 till August 1848, when, on going to have the land advertised for sale, the plaintiff opposed and brought the present action.

Judgment therefore went for the plaintiff, releasing the land from sequestration, parties paying their own costs.

Both parties here appealed against this judgment, the plaintiff for his costs, and the defendant on the merits.

The above is the abridgment of the case by the judge who heard it in appeal, and is consistent apparently with the facts.

The main question is whether there has been such laches on the part of the defendant in prosecuting his writ of execution as shall have the effect of destroying his right under it.

The Ordinances and the rules of court regulating proceedings in execution evidently follow the Dutch law, so far as practicable in this Island. *Cens. For. pt.* 2, *l.* 1. 33. 19; and when these are silent on any matter having reference thereto, it is to that law that courts must resort.

The 35th clause sect. 1 of the rules for the district courts in ordinary civil jurisdiction provides that if no execution shall be taken out within 12 months after judgment, a rule on the adverse party to shew cause against it must be obtained before it shall issue. But nothing is provided regarding delay in executing writs, either by ordinance or rule. We must therefore have recourse to the Dutch law, and that law provides that if the Letters of Execution be not executed within one year, they prescribe, and new letters must be taken out. *VanLeeuwen Comm.* 5. 26. 3. *Cens. For, pt.* 2. L. 1. 33. 7.

It does not appear, however, that these authorities can apply to the present case, because though the writ was not actually executed within one year from its date, yet it has been in operation in the fiscal's hands, and on the 4th October 1845 the fiscal reports to the court that, by virtue of the writ, he had levied without sale of the property surplus of the writ No. 10,011, the sum of £20 4*s.* 3*d*; and he requested that the writ may be returned for the recovery of the balance. The

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writ was extended accordingly, and on the 24th March 1846, the fiscal reported opposition to a sale then about being made by him under the writ.

The opposition here referred to was afterwards adjusted, and on the 21st November 1846 the fiscal reported a further levy by sale.

On the 26th November 1846 the writ was re-issued "for service," and again re-issued for the same purpose on the 4th February 1847.

At length on the 28th October 1848, the fiscal reports the present opposition.

It thus appears that the writ was in active operation from time to time from its date; and that no such laches as supposed by the district judge can be imputed to the defendant. This court is therefore of opinion that the defendant is entitled to have his sequestration proceeded with upon such lands as were seized in 1844, subject of course to all preferent claims when duly established, as the plaintiff's mortgage and the otty holder's claim &c.

The judgment of district court is set aside, and case remanded to the district court to ascertain what lands were seized under the defendants writ in 1844.

June 30. P. C., Colombo, No. —— } *Queen* v. *Price*.

Per Curiam :—The majority of the court having exdressed its opinion that it has jurisdiction to entertain this case in review, the court proceeds now to consider the validity of the objections made by the counsel for the sureties to the order of the police court.

1st.—As to the objection that the bond is void being taken at a time when the justice had no power to take it.

The circumstances are that on the 8th March 1851 Price was brought before the justice charged on oath with theft &c. No depositions were then taken nor was anything done save that the recognizance B. was taken "to appear and answer to "any information, indictment or sufficient complaint which "shall be presented against him in any competent court for "Midland Circuit upon receiving notice of the time and place "of holding such court at Colombo," and he was told to appear on the 15th of the same month and he appeared on divers days afterwards and the examination was closed on the 10th of May and it is argued that the justice had no power of taking the

recognizance inasmuch as when taken the accused was only charged on oath and no depositions of witnesses nor the examination of the accused taken.

The court is unanimously of opinion that on that account the recognizance was void, that the justice had no power to take it—that he could not at that time take bail to appear at trial or bail for any other appearance.

The court is of opinion that the Ordinance No. 15 of 1843 points out how and when persons shall be bailed and in doing so intends to follow the English law then existing and for that purpose repealed the regulation No. 5 of 1827 by which persons were permitted to be bailed in certain cases to appear before the justice for further examination, which the English law did not but which has now been altered by the Metropolitan Act and the Act 11 and 12 Victoria, and in repealing that regulation and providing a form of proceeding in which remanding for further examination and bail are provided for, no mention is made for taking bail for appearance on further examination. We conclude that no such indulgence was extended and that, whatever the law was prior to this time, henceforth it was to be found in this Ordinance and therefore that no bail could be taken for appearance before the justice for any purpose, and that bail could not be taken to appear at the trial upon a charge upon oath before examination were taken, nor in any way except as specified in that Ordinance, and we construe the provisions of that Ordinance to enact that depositions must be taken and the examination of the party accused taken before these preliminaries were gone through, and therefore we hold the bail bond void. But it has been urged on behalf of the Crown that if this be so the court is precluded from looking into the proceedings of the justice inasmuch as it was no part of the duty of the police court to look into such proceedings, but to receive proof of the forfeiture of the recognizance which might have been taken irregularly, and the court sustains this view of the case (*dissentiente* the senior puisne justice)—for although it has been very liberal in construing irregularities in favor of the reviewant, yet it has never gone so far as it is asked to go in this case. Whatever irregularity the justice might have committed in taking the recognizance or in taking it at all was not for the police court to enter into, its duty being to take proof of the forfeiture of the recognizance and proceed thereon. The court is therefore of opinion that in this respect there is no irregularity of proceeding.

2nd.—As to the alleged irregularity that the examination was unduly delayed, we think the same argument holds good

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and that it was not the duty of the police court to consider this matter in taking proof of the forfeiture.

3rd.—It is objected that no notice of trial or to surrender their principal or no due notice was given to the sureties. We do not find that by the conditions of the recognizance any such notice was stipulated for and that no such notice could be required.

4th.—It is objected that the notice of trial as stipulated for in the recognizance was not given. The condition of the recognizance that "Price shall appear and answer to any infor-"mation, indictment, or sufficient complaint which shall be "presented against him in any competent court for Midland "Circuit upon receiving notice of the time and place of hold-"ing of such court at Colombo (which place is hereby elected "by him for that purpose.)"

To save trouble in searching for the party on bail to give him notice of the time and place of his trial he is to name a certain place where service is to be made and which need not be personal but may be left at the place named. The justice was content with a very indefinite place and it may be very difficult to say what constituted good service. We think leaving the notice at the party's last place of abode would be good service, and of course personal service would be good. Now a notice was left for him at his last place of abode and the question is did such notice comply with the condition of the recognizance? We think not. It must be admitted that it was not requisite to serve him with any indictment &c., but it was requisite that he should receive notice of the time and place of holding a court where he was to appear and answer and &c. Has he received such notice, that is, was such notice served? The notice is headed. The *Queen* v. *William Nicholas Price* for fraud and theft; is addressed to Price and proceeds thus: "You are hereby directed to appear before the Supreme Court "at Colombo forthwith on pain of forfeiting your recognizance "in the above case." It is dated the 7th August and served on the 12th on the same month. Before this time officers had been looking for Price whom they could not find but this is the only legal service. It was said that he had left the Island, but of this there is no conclusive legal proof if it were of any consequence. This notice was served by functionaries who believed that Price had left the Island sometime before service for the purpose of fulfilling the condition of the recognizance, and the court considers with these functionaries that notice must be served in order to forfeit the recognizance, but such notice did not give Price notice of the time of holding the

court the usual words indicating the time to wit—" the day of next at 9 o'clock in the morning" where scrached out of the printed form and the word "forthwith" inserted instead thereof. The party for whose use the notice is given is left in uncertainty as to what is the time specified for his appearance. He finds his appearance to be forthwith but when it is served it is already the 12th August, five days after its date which is the 7th August, he might suppose the unspecified time when he ought to appear is long since passed. Can it be said that parties are to be condemned to pay £2,000 or any other sum because one of them could not ascertain when the word "forthwith" taken in connection with the date of the notice and the time of the service thereof required him to appear? The parties were entitled to a clear, unambiguous notice of the time of appearance before their recognizance can be forfeited. We cannot look at this case (assuming that Price left the Island before the service) otherwise than if he were still here. He and his sureties are entitled to say, " we abide by our bond." The court is of opinion that the cognizor and his sureties have been ordered to pay into the police court the amount of the recognizance without proof of the forfeiture. The court holds there is no evidence whatever of the forfeiture, and following former decisions as to what is irregularity in proceedings in the inferior courts where there is no cause of action, holds that the proceedings are irregular and should be set aside and the same are hereby set aside accordingly.

There was another point taken by the counsel for the appellant, namely that the police court exceeded its jurisdiction in entertaining this case, and the second puisne justice is disposed to concur in the same view, considering that the police court in dealing with forfeited recognizances taken by justices as in this case must be limited by the analogy of its ordinary jurisdiction and could not therefore deal with a recognizance to so great an amount as the present. But the point not having been pressed by counsel at the hearing, the court gives no opinion thereon.

D. C., Jaffna, No. 4,591. } *Toussaint* v. *Sattorokelsinga.** June 30.

The defendant was the owner of certain premises in Jaffna which he agreed to sell to defendant, who thereupon got into

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* The facts of the case are taken over from the *Legal Miscellany*, 1852.—Ed.

possession. No transfer was made conveying property to defendant. On the 29th October 1849 defendant gave notice to plaintiff to quit the premises and to have his things removed, adding that if he did not do so within a stated time, he the plaintiff would remove the things to some other place until the defendant should require the same. On the 1st November the defendant entered the house by force and removed the things for which plaintiff brought trespass. Defendant justified, pleading property and notice to quit. The district court of Jaffna held that the trespass was proved—that plaintiff was in possession of the house at that time of the trespass, on the understanding that the house was to be transferred to him—and that being in such possession the defendant was not justified in the steps taken to dispossess the plaintiff. Judgment for plaintiff, damages £9 9*s.* Against this judgment the defendant appealed and the case came on before the senior puisne justice (*Carr*) who reserved the same for collective hearing, under the following order:—

" That the decree of the district court of Jaffna of the 11th day of June 1851 be reserved and the plaintiff's claim be dismissed with costs; subject to the opinion of the judges collectively, whether the defendant was entitled to resume possession of the premises, and to remove the furniture of the plaintiff therefrom after the notice or letter requesting him to quit the house and premises marked C.

" The English law is clearly in favor of defendant's right to act, as he has done; and the only question is whether under the Roman Dutch law the defendant was still bound to have resorted to an action to recover possession of the premises, of which he was the lawful proprietor. In the event of the judges being of the latter opinion, the consideration of the costs to be paid in this suit is also reserved for their opinion."

At the hearing before the judges collectively the Deputy Queen's advocate appeared for the appellant and R. Morgan for respondent.

Per Curiam:—The collective court is of opinion that both under the English and Dutch law the defendant was entitled to resume possession of the premises in question and to remove the furniture of the plaintiff therefrom after the notice demanding possession given by him, and the decree of the district court of 11th June 1851 is therefore reversed and the plaintiff's claim is dismissed with costs.

D. C., Colombo, No. 13,407. } *Asserappa* v. *Perera*, and six others.*

"Supreme Court Collective Minutes." 1852. June 30.

Plaintiff brought ejectment against defendants to oust them from a land called Belingahawatte situate at Cotanchina in Colombo. The 1, 3, 5 and 6 defendants were in default and interlocutory judgments were granted against them without any order calling for evidence. No rule was served on the 4th. The 2nd and 7th defendants pleaded to the libel, and the case came on for trial on their plea. When the trial came on, the plaintiff moved to waive the 2nd, 4th, and 7th, defendants and that the judgment be made final against the 1st, 3rd, 5th, and 6th. The court at once absolved the 2nd and 7th, but took time to consider the motion as respects the 1st, 3rd, 5th, and 6th defendants. The next day, the court made order calling for evidence against these defendants. This order was appealed from on the grounds that the court having already granted interlocutory judgment against them could not call for evidence, and that the court should not have reversed the motion, but either have granted or rejected it altogether. The appeal came on before Stark, J. who reserved the same for collective hearing, making the following order :—

"It is considered and adjudged that the orders of the district court of Colombo of the 31st day of July and the first day of August 1851 respectively be affirmed, subject to the opinion of the judges collectively on the following points, whether the district court did right in over-ruling the plaintiff's motion for final judgment and ordering him to adduce further proof in support of his claim, and if so whether any or what direction should be given in regard to the final judgment in the case, and also whether the district court did right in severing the proceedings on the part of the plaintiff on 31st July and giving judgment of absolvitur against the defendants waived, while it also ordered further evidence in support of the claim.

"This is an action to recover possession of a garden. There were several defendants, some of whom entered appearance and pleaded, and against others in default interlocutory judgment was entered. The case was fixed for trial, and on the day of trial, 31st July 1851, the plaintiff and 2nd defendant were examined and the 2nd defendant was in course of examination

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* The facts are taken over from the *Legal Miscellany*, 1852, p. 24.—Ed.

"Supreme Court Collective Minutes," 1852.

when the plaintiff waived those defendants who had pleaded and moved for final judgment against the others. The defendant who had been waived were absolved from the instance with costs, but the plaintiff's motion for final judgment was (after time taken for consideration) over ruled and further proof in support of his claim ordered—the district court relying on the rules of practice 17th June 1844 clause 4, which indeed provide for a case where among several defendants, as here, some are in default and some pleaded, but there is no power expressly given to call for further evidence, a "trial of the cause" being there only as it would appear in contemplation. The plaintiff also complains of his proceeding on 31st July being severed and its parts separately considered by the district court."

Per Curiam:—In this case the collective court considers that the plaintiff was not entitled under the rules of practice of the 17th June 1844 sec. 4 to move at the trial to withdraw his case against or waive three of the defendants who were not in default in order to obtain a final judgment thereon against the remaining five defendants, against whom interlocutory judgment had been entered, as this court considers that such motion was evasive of the rule, and that the district court ought not also to have severed such motion and assented to a part thereof when it was virtually to preclude the court from doing justice to the remaining defendants who would thereby lose the benefit which they were entitled to under the said rule of court of final judgment being given upon the merits for or against the defendants as justice should require and without reference to the defaults of some of them which had been committed.

Considering that all parties and the district judge appear to have been clearly acting under what the Supreme Court considers a misapprehension of the above rule, the Supreme Court is of opinion that the best course is to place the parties in statu quo—and to reverse the orders, upon the plaintiff paying the costs thereof and of this appeal.

June 30. D. C., Badulla, No. 13,871. } *Meera Saibo* v. *Falconer*.

This was an action upon a promissory note, given to plaintiff by one Shand. Shand being about to leave the jurisdiction, plaintiff contemplated taking steps to arrest him, when the defendant interfered, and upon his undertaking plaintiff dropped proceedings against Shand. Plaintiff then demanded pay-

"Supreme Court Collective Minutes," 1852.

ment of the promissory note from the defendant, and the latter wrote to plaintiff the following letters "Mr. Shand having left the district I have to report what I told you verbally last week that I shall be prepared to adjust your claims against him"—"I am this day in receipt of your's of 21st—all that I can do for you is to settle the promissory note—as to costs of suit or any thing else I can do nothing" "I have seen your men with the receipt which I don't want.—If you will send me the promissory note I shall give you an order for the amount on Colombo." When these letters were tendered in evidence in the court below, it was objected for the defendant, that they were inadmissible for want of stamps. The district judge overruled the objection and gave judgment for the plaintiff. From this defendant appealed, and the judge on circuit made the following order, reserving the case for the opinion of the collective court:—

"Affirmed subject to the opinion of the collective court whether the letters tendered in evidence require a stamp. If the collective court are of opinion that a stamp is requisite, then the judgment is to be set aside and the case remanded to the district court for the purpose of admitting them to be stamped and to proceed to judgment *de novo*. Should the opinion of the collective court not disturb the affirmation of the judge, the plaintiff is to be entitled to his costs, otherwise the costs to stand over."

Per Curiam:—In this case the question reserved for the consideration of the collective court viz., whether the letters tendered in evidence require a stamp, disposes of the rest of the case, the court being of opinion that no stamp is requisite upon such letters, because by the Ordinance No. 9 of 1840, clause 21, no promise contract bargain or agreement, unless it be in writing and signed by the party making the same, shall be of force or avail in law to charge any person with the debt, default or miscarriage of another, and as the consideration does not sufficiently appear on the face of, nor can be necessarily collected from, the letters themselves, they are not in law binding upon the defendant as any guarantee or promise in writing to answer for the payment of the debt, default or miscarriage of Mr. Shand—See *Smith's Merc. Law* p. 412, 417, nor if tendered only as an admission or acknowledgement of any antecedent parol contract or agreement between the parties to the same effect (which was not binding in itself) could they be held sufficient evidence in law to establish the same or require a stamp. See *Tilsey on Stamps* p. 24, 25. *Beeching* v. *Welsbrook* 8 M. and W. 411.

"Supreme Court Collective Minutes," 1852.

Dec. 16.

The Queen v. *Kappa Kando, et. el.*

The special verdict returned by the jury in this case against the above prisoners at Kandy on 30th August last, was reserved by Carr, J. for the decision of the judges of the Supreme Court collectively.

The point reserved was whether a jury having found a prisoner guilty of assault, who was tried for robbery on the usual indictment for robbery which contains a substantive charge of assault, the conviction is good.

OLIPHANT, C. J. and STARK, J.—We are of opinion (dissentiente Carr, J.) that, as there is no distinction drawn in this island between felonies and misdemeanours, it is competent to find a prisoner guilty of assault under the form of indictment aforesaid just as he may be found guilty of housebreaking when indicted for housebreaking and theft.

CARR, J.—In this case, I must differ in opinion from my brother judges, as I consider that the court is bound to follow the practice and precedents, which have been adopted and prevailed in such cases with the sanction of the judges for so many years.

It is not in my opinion a mere question of law. The Charter does not empower the judges to make new laws, but it expressly directs them by the 51st clause to make such general rules and orders touching the form and manner of proceeding at criminal sessions, the practice and pleadings in all suits and matters, both civil and criminal. The only rules for criminal pleading made are 1st that the libels shall be prepared, allowed and signed by the Queen's Advocate, or his deputy, or by his direction; and 2ndly (the rule of the 6th December 1845) that no objection shall lie to the form of an information where the objection would not be allowed by the law of England, and to disallow objections from the omission to state the venue, description and residence of the accused, or time and place, and to allow of property being laid alternately in two persons, or of both or one of them. The provisions of this latter rule appear to me to tacitly acknowledge and recognize the English forms of procedure to prevail here; or else the greater part of it would be superfluous and uncalled for under Dutch law. Every practitioner in the court, moreover, knows that the informations have been mainly drafted from the English precedents, and that Archbold's Pleading and Evidence in criminal cases is our usual text book. Neither the Queen's Advocate nor the Registrar also can adduce any instance of a prisoner having been convicted in this court for assault upon a count

for robbery, and the practice has always been to insert in informations for robbery a second and distinct count for assault.

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Admitting that by the strict rule of pleading, the charge of assault in this court is "a divisible averment," why introduce that technicality in a case where we have hitherto avoided it. Our having adopted the English practice of allowing verdicts of manslaughter to be found in charges of murder, or of theft on burglary, forms no precedent in this case, because on the other hand, in cases of murder, manslaughter and other offences including an assault, we have never allowed a verdict or conviction for assault. Abundant instances can also be shewn on each circuit where separate counts for assault have been added in informations for these offences. There is the less reason moreover to resort now to this change in our practice, when England has recently adopted the very opposite course: under the Criminal Justice Improvement Act of the 14th and 15th Vict. Cap. 100, it is no longer competent for the jury on the trial of prisoners for offences which include an assault to convict the prisoner of the common assault, and it has substituted two other provisions, viz. that, in all cases of felony and misdemeanour, the prisoner may be found guilty of an attempt to commit the same; 2ndly, that in charges of robbery, the prisoner may be found guilty of assault with intent to rob. Under the new Ordinance lately passed, both these new enactments have been introduced here without any provision that the prisoner on informations for offences which include an assault, could not be found guilty of common assault; an omission arising obviously from the enactment in 1 Vict. c. 85 sec. 11 not having been extended to this colony, and the practice hitherto never having prevailed it it; but I must confess my surprise that the Queen's Advocate should, after introducing that Ordinance, press for a conviction in this case, or seek now to change on old practice, when it is consistent with the present law of England.

It appears to me more desirable to adhere to the course of procedure hitherto adopted in cases like the present; because it can only tend to embrass a judge on circuit, if he cannot rely upon the practice and precedents of the court as his guide on objections to criminal pleadings, especially when there are no settled rules (except the two referred to), or forms of criminal pleadings in the court. Collective decisions on the subject are of very rare occurrence; and as to resorting to Dutch or Kandyan law on forms of criminal pleading, they would admit of changes *ad libitum*, and are briefly inapplicable.

"Supreme Court Collective Minutes," 1852.

With an ignorant population, I think the less complicated any changes are the better, and that it is preferable to retain the 2nd count for assault in these cases as being the more simple and intelligent mode of proceeding, both to the minds of a native prisoner and jury; and I have always been averse to any change *in substance* in the old forms of informations, and have adhered myself most strictly to this course, when I was Queen's Advocate, because I know that such changes tend only to perplex the native jurors who are used to and understand the accustomed forms.

Dec. 24.

The Queen v. *Juanis*.

The point reserved in this case was in substance, whether when three copies of a bond are made contemporaneously—one of which is given to the obligee, another remains in the notary's protocol, and another is filed in the district court (although such filing is not required by law),—and an information is preferred against the obligor in the bond for perjury, in that he charged the notary who drew the bond with affixing his (the obligor's) name to it, without his knowledge or consent, and in such information the term bond is used generally,—the copy filed in the district court can be given in evidence without notice to produce, or accounting for the absence of, the copy delivered to the obligee,—and whether the copy from the district court having been given in evidence did not afford proof only as to the duplicate of a bond and not as to the bond itself.

Per Curiam.—This being a question strictly of evidence is to be decided by English law. By that law it has been laid down without a contradictory decision: "That if there are "two contemporary writings, the counterparts of each other, "one which is delivered to the opposite party, and the other "produced, as they may both be considered originals and they "have equal claims to authenticity, the one which is produced "may be received in evidence without notice to produce the "one which was delivered:" By Lord Ellenborough, *Philipson* v. *Chace*, 2 Camp. 110; and no case has been cited which militates against this doctrine. The three copies made in this case are sworn to have been made contemporaneously and must be considered as contemporaneous documents, and every one of them *primary evidence.* The copy produced was proved to have been signed by the accused and to have been an original

triplicate of a bond laid in the indictment touching which the accused committed perjury. The conviction therefore is good.

"Supreme Court Collective Minutes," 1852.

Dec. 24.

D. C., Kandy, No. 25,719. } *Selby* v. *Juanis*

The point reserved in this case was whether intervenients who come into the suit on the side of the defendant to defend the titles of properties sold by them to him are to provide stamps on their pleadings of the respective values of the lands sold by each, or of the value of the whole land as stated in the libel.

Per Curiam:—The amount in the claim has hitherto, unless disputed as excessive, been held invariably to regulate the stamps on all proceedings in the suit, and we think this practice should not be departed from. The order of the district court therefore is *affirmed*.